DOCKET

No. 13-1314

Title:	Arizona State Legislature, Appellant
	v.
	Arizona Independent Redistricting Commission, et al.
Docketed:	April 30, 2014
Linked with 14A722	
Lower Ct:	United States District Court for the District of Arizona
Case Nos.:	(CV-12-01211-PHX-PGR-MMS-GMS)
Decision Date:	February 21, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Apr 28 2014	Statement as to jurisdiction filed. (Response due May 30, 2014)
May 6 2014	Waiver of right of appellee Arizona Secretary of State Ken Bennett to respond filed.
May 8 2014	Order extending time to file response to petition to and including June 30, 2014.
Jun 30 2014	Motion to dismiss or affirm filed by appellee Arizona Independent Redistricting Commission and Commissioners.
Jul 14 2014	Reply of appellant Arizona State Legislature, Appellant filed.
Jul 16 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 2 2014	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits limited to the following questions: 1) Do the Elections Clause of the United States Constitution and 2 U. S. C. 2a(c) permit Arizona's use of a commission to adopt congressional districts? 2) Does the Arizona Legislature have standing to bring this suit?
Nov 7 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the appellant.
Nov 14 2014	The time to file the joint appendix and appellant's brief on the merits is extended to and including December 2, 2014.
Nov 14 2014	The time to file appellees' brief on the merits is extended to and including January 16, 2015.
Dec 2 2014	Brief of appellant Arizona State Legislature filed.
Dec 2 2014	Joint appendix filed. (Statement of costs filed.)
Dec 9 2014	Brief amicus curiae of National Conference of State Legislatures filed.
Dec 9 2014	Brief amicus curiae of Coolidge-Reagan Foundation filed.
Dec 22 2014	SET FOR ARGUMENT ON Monday, March 2, 2015
Dec 22 2014	Record requested from U.S.D.C. Dist. of Arizona.
Dec 23 2014	Record from U.S.D.C. Dist. of Arizona is electronic and located on PACER.

Jan 5 2015	Application (14A722) to extend the time to file a reply brief from February 17, 2015 to February 23, 2015, submitted to Justice Kennedy.
Jan 7 2015	CIRCULATED.
Jan 7 2015	Application (14A722) denied by Justice Kennedy.
Jan 13 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Appellees the Arizona Independent Redistricting Commission, et al.
Jan 15 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Appellee Arizona Secretary of State.
Jan 16 2015	Brief of appellees Arizona Independent Redistricting Commission, et al. filed. (Distributed)
Jan 22 2015	Brief amici curiae of Nathaniel Persily, et al. filed. (Distributed)
Jan 23 2015	Brief amicus curiae of the United States filed. (Distributed)
Jan 23 2015	Brief amici curiae of Thomas Mann, and Norman Ornstein filed. (Distributed)
Jan 23 2015	Brief amici curiae of State and Local Elected Officials filed. (Distributed)
Jan 23 2015	Brief amici curiae of Former Gov. Jim Edgar, et al. filed. (Distributed)
Jan 23 2015	Brief amici curiae of Former California Governors George Deukmejian, et al. filed. (Distributed)
Jan 23 2015	Brief amici curiae of Scholars and Historians of Congressional Redistricting filed. (Distributed)
Jan 23 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 23 2015	Brief amici curiae of The Campaign Legal Center, et al. filed. (Distributed)
Jan 23 2015	Brief amici curiae of Jack Rakove, et al. filed. (Distributed)
Jan 23 2015	Brief amici curiae of The States of Washington, et al. filed. (Distributed)
Jan 23 2015	Brief amicus curiae of California Citizens Redistricting Commission filed. (Distributed)
Jan 23 2015	Brief amici curiae of Members of Congress filed. (Distributed)
Jan 23 2015	Brief amici curiae of League of Women Voters of Arizona, et al. filed. (Distributed)
Jan 23 2015	Brief amicus curiae of Brennan Center for Justice at N.Y.U. School of Law filed. (Distributed)
Feb 17 2015	Reply of appellant Arizona State Legislature filed. (Distributed)
Feb 20 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 2 2015	Argued. For appellant: Paul D. Clement, Washington, D. C. For appellees: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae); and Seth P. Waxman, Washington, D. C.

JURISDICTIONAL STATEMENT

No. 13-1314

In the Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Arizona

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QUESTION PRESENTED

In a provision added by citizen initiative, the Arizona Constitution removes all authority to prescribe legislative and congressional redistricting from the Arizona State Legislature and places it in an unelected commission. The Legislature challenges this provision as to congressional redistricting as a violation of Article I, section 4, the Elections Clause of the United States Constitution. In a 2-1 decision, a three-judge panel of the District Court for the District of Arizona ruled that removing the Legislature did not violate the Elections Clause. The question presented is:

Does the provision of the Arizona Constitution that divests the Arizona Legislature of any authority to prescribe congressional district lines violate the Elections Clause of the United States Constitution, which requires that the time, place, and manner of congressional elections be prescribed in each state by the "Legislature thereof"?

PARTIES TO THE PROCEEDING

Appellant here, and Plaintiff below, is the Arizona State Legislature.

Appellees, and Defendants below, are the Arizona Independent Redistricting Commission, Colleen Mathis, Linda C. McNulty, Cid R. Kallen (replacing former commissioner Jose M. Herrera purusant to Fed. R. Civ. P. 25(d)), Scott D. Freeman, and Richard Stertz in their official capacities as members of the Arizona Independent Redistricting Commission, and Ken Bennett in his official capacity as Secretary of State of Arizona.

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OPINION BELOW

On February 24, 2014, the three-judge district court (Rosenblatt, Schroeder, Snow, J.J.) entered the Judgment that is the subject of this appeal. The district court's majority opinion and Judgment are reproduced at App. 2-23 and 24-25 respectively. The dissenting opinion by Judge Rosenblatt begins at App. 20.

JURISDICTION

On August 21, 2013, the Ninth Circuit Court of Appeals ordered the appointment of a three-judge district court pursuant to 28 U.S.C. § 2284(b)(1). The three-judge court entered its final judgment granting a motion to dismiss and denying injunctive relief on February 24, 2014. Appellant filed the Notice of Appeal on February 26, 2014. This Court has jurisdiction under 28 U.S.C. § 1253.

RELEVANT STATE AND FEDERAL CONSTITUTIONAL PROVISIONS

Article I, § 4, cl. 1 of the United States Constitution, the "Elections Clause," states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Appellant challenges the Constitutionality of Arizona Constitution article IV, part 2 § 1(3) – (23),

reproduced at App. 29-36, as applied to federal congressional elections.

STATEMENT OF THE CASE

This case presents a Constitutional challenge to Arizona Constitution article IV, part 2 § 1(3) – (23) ("Prop. 106"), an initiative-based amendment to the Arizona Constitution, which divests the Arizona State Legislature ("Legislature") of authority over congressional redistricting in favor of an unelected Independent Redistricting Commission ("IRC"). Appellant brings this challenge on the grounds that Prop. 106 impermissibly removes the legislature from its constitutional role under the Elections Clause. In a majority opinion, a three-judge panel of the District Court for the District of Arizona held that the term "Legislature" in the Elections Clause refers to the entire lawmaking process of the state; that Prop. 106 does not violate the Elections Clause; and that shifting the authority to prescribe congressional districts away from the Legislature and vesting it in the IRC does not violate the Elections Clause.

A. The Background of Prop. 106

From its first year of statehood in 1912 until 2000, the Legislature established congressional district lines in Arizona. App. 3. The Legislature's congressional redistricting authority was subject to the limitations of the legislative process, including, for instance, gubernatorial veto. *Id.*

A private citizen group placed an initiative measure on Arizona's November, 2000 general election ballot, designated by the Arizona Secretary of State as Proposition 106. The initiative was intended to "take[]

the redistricting power away from the Arizona Legislature and put[] it in the hands of a politically neutral commission of citizens who are not active in partisan politics...." App. 43. The measure passed, and amended the Arizona Constitution to create Arizona Constitution article IV, part 2 § 1(3) – (23). True to its purpose, Prop. 106 took outcome-determinative authority over congressional redistricting away from the Legislature and gave it to the IRC. App. 22.

The IRC is convened in February of each year ending in one (e.g. 2001, 2011, etc.). Ariz. Const. art. IV, pt. 2 § 1(3). Four of the five members of the IRC are chosen by the highest ranking officer and minority leader of each chamber of the legislature from a list of ten candidates pre-selected by Arizona's Commission on Appellate Court Appointments. The four appointed members themselves then choose the fifth member from the pre-selected nomination pool to serve as chair. *Id.* at ¶¶ 4-8. After appointment, the members of the IRC can only be removed by the Governor of Arizona, with the concurrence of two-thirds of the Senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office. *Id.* at ¶ 10.

The IRC creates congressional districts based on set criteria, including (A) compliance with the U.S. Constitution and Voting Rights Act, (B) equal population to the extent practicable, (C) geographic compactness, (D) respect for communities of interest, (E) use of geographic features and city and county boundaries, and lastly (F) favoring politically competitive districts. *Id.* at ¶ 14. Prop. 106 states that the IRC "shall" establish final district boundaries and "shall" certify them to the secretary of state. *Id.* at

¶¶ 16-17. The IRC thus has ultimate and exclusive decision-making authority on congressional redistricting. Unlike ordinary legislative enactments in Arizona, the IRC's district maps are not subject to checks in the legislative process such as gubernatorial veto or referendum. Ariz. Const. art. IV pt. 1 § 1(3) (referendum power applies only to measures "enacted by the legislature").

Under Prop. 106, the Legislature is permitted only to submit nonbinding recommendations to the IRC. *Id.* at pt. 2 § 1(16). The Legislature is also required to make necessary appropriations for the operation of the IRC. *Id.* at ¶ 18. And the IRC is granted legal standing to challenge by suit the adequacy of funding supplied by the Legislature. *Id.* at ¶ 20. Neither members of the Legislature, nor any candidates for or holders of any other public office, may serve on the IRC. *Id.* at ¶ 3.

The most recent iteration of the IRC, using the 2010 Census data, approved congressional district lines on January 17, 2012, and forwarded its maps to the U.S. Department of Justice for preclearance. App. 4. As directed by Prop. 106, the Arizona Secretary of State used the IRC's congressional maps to determine congressional election districts for the 2012 general election. Under current law, the IRC's congressional maps will be used in the 2014 general election, and will continue to be used in congressional elections until a new IRC is convened in 2021. Ariz. Const. art. IV., pt. 2, § 1 at ¶¶ 5, 17, and 23.

B. Procedural Background

The Legislature first filed its Complaint on June 7, 2012, requesting declaratory relief as to the

constitutionality of Prop. 106 and any congressional map created by the IRC. Because the election time frames for the 2012 election cycle were underway, the Legislature sought injunctive relief to commence the day after the 2012 general election. App. 48. On June 8, 2012, the Legislature filed a motion requesting a three-judge panel be convened pursuant to 28 U.S.C. § 2284(a). The district court initially granted the motion, but then entertained a motion to reconsider. Over a year later on August 14, 2013, the district court denied the motion to reconsider, confirmed its order, and requested a three-judge court be convened. The three-judge court was convened on August 23, 2013.

On January 24, 2014, the three-judge district court panel conducted oral argument on the IRC's Motion to Dismiss for failure to state a claim and the Legislature's Motion for Preliminary Injunction. On February 24, 2014, the district court entered final judgment granting the IRC's motion to dismiss, and denying the Legislature's Motion for Preliminary Injunction. The Legislature filed its notice of appeal on February 26, 2014.

C. The District Court Decision

In its opinion below, the district court held that the Legislature has standing, that the action was not barred by laches, and that consideration of the constitutional merits was not precluded by the political question doctrine. On the merits, however, the court ruled that the term "legislature" as used in the Elections Clause encompasses a state's entire legislative process, and thus, Prop. 106 does not violate the Election Clause. App. 15.

The district court based its decision primarily on two prior cases where this Court directly addressed the effect of the Elections Clause on the authority of the state legislatures to conduct congressional redistricting: *Ohio ex. rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932). Both decisions approved the ability of a state to provide a limited check on their elected legislature's redistricting prerogative. Addressing Minnesota's application of the gubernatorial veto, this Court in *Smiley* held that "...there is nothing in Article I, section 4, which precludes a State from providing that legislative action in districting the State for congressional election shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." *Smiley*, 285 U.S. at 373-74. The district court interpreted the *Smiley* decision to mean that a State may structure its legislative power used to enact congressional election regulations in any way it sees fit. The relevant inquiry, according to the district court, is simply whether the state performed redistricting through a valid use of the legislative process as determined by the state's own constitution. App. 17.

In addition to *Smiley* and *Hildebrant*, the district court also based its decision in part on this Court's observation in *Growe v. Emison*, that "reapportionment is primarily the duty and responsibility of the State through its legislature ***or other body***, rather than of a federal court." 507 U.S. 25, 34 (1993) (emphasis added). Viewing the enactment of Prop. 106 as a valid use of voter initiative for a state constitutional issue, the district court ruled that the Elections Clause had not been infringed. Additionally, the panel majority

pointed to the selection process for IRC members and the Legislature's ability to suggest modifications in draft maps and observed that "Arizona has not entirely divested the legislature of any redistricting power." App. 19 n. 4.

In his dissent, Judge Rosenblatt noted that states may only regulate congressional elections to the extent permitted by the Elections Clause. App. 21 (citing *Cook v. Gralike*, 531 U.S. 510, 522-23 (2001)). Given that the Elections Clause operates as a restriction on the states' authority to regulate congressional elections, Judge Rosenblatt disagreed with the majority that the inquiry under the Elections Clause may only ask whether the state's exercise of its lawmaking power was valid as a state constitutional matter. He pointed out that any law passed by a state must still abide by the United States Constitution. App. 21.

Judge Rosenblatt further noted that none of the authority relied on by the majority permitted a state to remove ***all*** substantive redistricting authority from its legislature. App. 22. He also argued that the Elections Clause does in fact place substantive limits on a state's legislative process in redistricting, and would have held that Proposition 106's complete evisceration of the Legislature's ability to have an outcome-defining effect on the congressional redistricting process "is repugnant to the Election Clause's grant of legislative authority." App. 23.

THE QUESTION PRESENTED IS SUBSTANTIAL

The Court should note probable jurisdiction. This Court grants plenary review of direct appeals where the appellants pose a substantial question. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Prior to the district court's decision below, no court had ever held that a state may exclude completely its elected legislature from congressional redistricting in light of the plain import of the Elections Clause.

Since the time of the Civil War, both state and federal courts have addressed the authority to regulate congressional elections as delegated in the Elections Clause. *See, e.g., In re Opinions of Justices*, 45 N.H. 595, 607 (1864) (upholding the state legislature's suffrage law and stating that "the authority of the state legislature to prescribe the time place and manner of holding elections for representatives in Congress...is not an exercise of their general legislative authority under the Constitution of the State"); *Grills v. Branigin*, 284 F.Supp. 176, 180 (S.D. Ind. 1968), *aff'd per curiam*, 391 U.S. 364 (1968) (denying state election board's request to perform redistricting as they were not a "legislative" body under the Elections Clause); *Smith v. Clark*, 189 F.Supp.2d 548 (S.D. Miss. 2002), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003) (court did not have authority to redistrict, as under the Elections Clause, an entity that draws the lines must "find the source of its power to redistrict in some act of the legislature"); *compare Koenig v. Flynn*, 258 N.Y. 292, 300 *aff'd* 285 U.S. 375 (1932) (state legislature cannot redistrict by joint resolution, but must do so through the legislative process in the state

constitution); *In re Opinion of the Justices*, 118 Me. 552 (1919) (state legislature's act granting suffrage to women was subject to the state constitution's referendum provisions).

This Court's decisions in *Hildebrant* and *Smiley* make clear that the manner in which congressional redistricting is performed under the Elections Clause is in fact "legislative"; that "legislature" means the representative body that makes the laws of the people; and that legislatures must act within their respective states' legislative processes in prescribing congressional election regulations. *Smiley* indicates that the Elections Clause, by its use of the word "Legislature," refers to the "representative body which [makes] the laws of the people." *Smiley*, 285 U.S. at 365. However, neither *Hildrebrant* nor *Smiley* permit a state to divest its legislature of all meaningful authority to prescribe district lines, as in each case the state legislature retained the ability to draw district lines.

The use of independent commissions, often in conjunction with the state legislatures, has become a popular tool to aid in the politically sensitive and often contentious process of redistricting.[1] As it relates to redistricting of congressional boundaries, however, exclusive commission drawing authority is a relatively modern phenomenon. Only the voters of Arizona, and more recently, California, have fully divested their

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[1] At least twenty-four (24) states currently use redistricting commissions, primarily in drawing state legislative district lines. Other states use commissions as a backup in case of deadlock, or in an advisory role.

elected legislatures of congressional districting authority, despite the Elections Clause's clear reference to the "legislature" of each state.[2] It is only this limited issue—complete removal of the Legislature from congressional redistricting—that Appellant challenges.

The authority to prescribe the time, place, and manner of federal elections is conveyed to the state legislature by the Constitution. It cannot be displaced through state action. The District Court's Order suggests that the authority is alienable through unilateral action of the states. Such a result is inconsistent with the Elections Clause. The Court should hold full plenary review of the District Court's decision in order to enforce the constitutional delegation of authority to the Legislature.

I. THE DECISION OF THE DISTRICT COURT IS INCONSISTENT WITH THIS COURT'S ELECTIONS CLAUSE JURISPRUDENCE.

The district court based its holding primarily on this Court's decisions in *Davis v. Hildebrant* and *Smiley v. Holm*.

In *Hildebrandt*, this Court reviewed a challenge to the validity of a referendum veto on the state General Assembly's 1915 redistricting plan, which passed as a statute, and would have superseded a redistricting plan passed just two years earlier by the legislature in

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[2] Arizona (Ariz. Const. art. IV, pt. 2 § 1), California (Cal. Const. art. XXI, § 2). Other states that perform congressional redistricting by commission amended their constitutions by constitutional convention (Hawaii) or by legislatively-referred amendments (Idaho, New Jersey, Washington).

1913. *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 168 (1916). The challenge to the referendum veto alleged in part that the veto was invalid, as the Elections Clause gave the state legislature absolute authority over redistricting. The Ohio Supreme Court denied the challenge, holding that the referendum veto was valid, and that the legislature's 1913 plan remained in effect. *Id.* The Ohio General Assembly retained the right to draw congressional district lines. It next passed a revised redistricting plan following the 1950 census. The General Assembly of Ohio continues to redistrict congressional lines by statute today. *See* Ohio Revised Code § 3521.01 (setting current congressional district lines).

This Court confirmed the Ohio Supreme Court's ruling. As a state law matter, this Court found that the referendum power "constituted a part of the state Constitution and laws," and was thus a valid check on the state legislature's congressional redistricting plan. *Hildebrant*, 241 U.S. at 568. To the extent that the petitioners in *Hildebrant* based their claim on a belief that a referendum could not be "legislative" under the Elections Clause, this Court held that this argument did not present a justiciable controversy. *Id.* at 569.

In *Smiley v. Holm*, this Court again addressed the limits placed by the Elections Clause on the states' redistricting processes. The governor of Minnesota vetoed a congressional map drawn by the state legislature. Despite the veto, the legislature registered the map with the Minnesota secretary of state on the grounds that both houses of the Minnesota legislature approved of it and the governor's approval or disapproval had no legal effect because of the Elections

Clause reference to "the Legislature." A citizen filed suit, arguing that "Legislature" in the Elections Clause encompassed the entire legislative power of the state, and thus the map could be of no effect because, after the governor's veto, "it was not repassed by the Legislature as required by law..." *Smiley*, 285 U.S. at 361-62.

The Minnesota Supreme Court ruled in favor of the legislature, and made two distinct holdings. First, it held that "Legislature" as used in the Elections Clause carries the ordinary meaning of the word: "the representative body, which makes the laws of the state," and ***not*** "the lawmaking power of the state." *State ex rel. Smiley v. Holm*, 184 Minn. 228, 235-36 (1931). Second, the court held that the duty vested in the state legislature by the Elections Clause was not an ordinary legislative authority, but an exclusive grant of power. *Id.* at 238. The legislature was thus the "mere agency to discharge the particular duty." *Id.* The state Supreme Court held that the legislature's redistricting plan was passed outside the ordinary legislative channels and that the governor's veto power could have no effect on the process.

This Court maintained the analytical approach of the Minnesota Supreme Court by addressing each holding in turn. First, this Court affirmed the Minnesota Supreme Court's holding regarding the meaning of the term "Legislature" in the Elections Clause. Since the time it was incorporated in the Constitution, "Legislature" has always meant "the representative body which ma[kes] the laws of the people." *Smiley*, 285 U.S. at 364 (citing *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). In clear terms, this

Court held that the Elections Clause specifies the body which is to regulate federal election procedures, and that body is the state legislature.

Second, this Court addressed: "whether the function contemplated by Article I, section 4, is that of making laws." *Id.* at 366. This Court observed that the Constitution makes several specific grants of authority to state legislatures. Prior to the adoption of the Seventeenth Amendment, state legislatures acted as electoral bodies for choosing United States Senators. Under Article I, § 3, state legislatures act as ratifying bodies for proposed amendments to the Constitution. And under Article I, § 8, cl. 17, state legislatures may act as consenting bodies for the acquisition of land by the United States. *Id.* at 365-66.[3] This Court held that a state legislature conducting redistricting performs a legislative function; therefore, "the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367-68.

The determinative issue in *Smiley* is not whether the state legislatures are the body authorized by the Elections Clause to conduct redistricting. Instead, this Court asked whether the state legislatures, when ***they*** act as a redistricting body, do so in a lawmaking

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[3] The *Smiley* decision does not mention the grant of authority to state legislatures by Article II, section 1, clause 2 to direct the manner of presidential electors. *See generally McPherson v. Blacker*, 146 U.S. 1 (1892).

function, subject to checks characteristic of the legislative process such as a gubernatorial veto.[4]

A. The District Court Departs From the Central Holding Of *Smiley v. Holm*

This Court did not hold in *Smiley* that ***any*** body or entity can be vested with the authority to conduct congressional redistricting. It held that the language of the Elections Clause does not prohibit limitations on a state legislature's prerogative that are part of the ordinary legislative process. State legislative authority is still limited by the language of the Elections Clause. *Id.* at 372 ("Article I, section 4, plainly gives authority to the State to legislate ***within the limitations therein named***") (emphasis added). In summary, the *Smiley* holding is twofold. First, answering the ***identity question***, "Legislature" means the representative body that makes the laws of the state. Second, answering the ***function question***, in the specific context of redistricting, state legislatures exercise lawmaking authority.

The district court's judgment departs from the *Smiley* decision by conflating these two holdings. For the panel majority, "the word 'Legislature' in the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws." App. 15. In fact, *Smiley* holds precisely the opposite: "Legislature" in the Elections Clause refers to the "representative body that mak[es]

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[4] Departing from its prior decision in *Hildebrant*, this Court did not suggest that the Elections Clause analysis was in any way connected to the Republican Form of Government.

the laws of the people." *Smiley*, at 364. Based on this misreading, the district court below denied that "redistricting authority was vested uniquely in the legislature," and instead held that the states have "discretion of where to place such authority within the scope of the 'state's legislative power.'" App. 12-13.

According to the panel majority:

> [T]he relevant inquiry is not whether Arizona has uniquely conferred its legislative power in representative bodies, it is whether the redistricting process it has designated ***results from the appropriate exercise of state law***. There is no dispute that the IRC was created through the legislative power reserved in the people through the initiative with the specific purpose of conducting the redistricting within the state, and that in exercising its functions the IRC exercises the state's legislative power.

Id. at 17 (emphasis added). This logic is irreconcilable with the Elections Clause and this Court's precedents because it abandons the specific meaning of "Legislature" and replaces it with "legislative process." As long as a state uses its legislative process it could undertake redistricting in a variety of ways. To take a few examples:

- It could vest redistricting in a particular officer, such as its attorney general, secretary of state, or governor.
- It could undertake redistricting directly through the initiative process by having the people vote on maps directly.

- It could direct that redistricting be conducted by the state's judiciary.
- Or—as Prop. 106 has done in Arizona—it could establish an unelected commission and vest it with all authority to establish congressional lines.

Indeed, in contrast to *Hildebrant* and *Smiley*, Prop. 106 creates a redistricting process that operates ***outside*** Arizona's legislative process. Under Prop. 106, there are no legislative checks on the IRC's district maps, such as referendum or gubernatorial veto. Ariz. Const. art. IV, pt. 2 § 1(16) ("independent redistricting commission shall...establish final district boundaries"); *cf.* Cal. Const. art. XXI, § 6(h)(i) (redistricting maps created by California's redistricting commission are "subject to referendum in the same manner that a statute is subject to referendum;" no such provision exists in Prop. 106). The IRC is fully insulated, and acts as the final authority for district lines. The system created by Prop. 106 is no different than if Arizona amended its constitution to give a single person, such as the Governor, ultimate, unimpeachable redistricting authority. Thus, the problem with Prop. 106 is not that it was enacted through the legislative process, but that it eviscerates the Constitutional redistricting process mandated by the Elections Clause. Past Justices of this Court have twice indicated in dissent that the Elections Clause acts as an affirmative limit on states' ability to remove their state legislatures from congressional redistricting. *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., dissenting from denial of certiorari) ("...there must be some limit on the State's ability to define lawmaking by excluding the

legislature itself..."); *California Democratic Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J. dissenting) (suggesting that redistricting by popular initiative, unreviewable by legislative action, could potentially be unconstitutional). The concerns of these justices are now realized.

The Legislature does not object to subjecting the redistricting process to the legislative checks contained in Arizona's constitution. Under *Hildebrant* and *Smiley*, redistricting plans in Arizona could constitutionally be subject to referendum and gubernatorial veto as part of ordinary Arizona lawmaking. But Proposition 106 violates the Elections Clause because it removes from the Legislature the actual ability to "prescribe."

B. The Arizona Legislature Has No Meaningful Role In Congressional Redistricting

The panel majority states that "Arizona has not ***entirely divested*** the legislature of ***any*** redistricting power." App. 19 n. 4 (emphasis added). "The Legislature retains," the Court continues, "the right to select the IRC commissioners, and the IRC is required to consider the Legislature's suggested modifications to the draft maps." *Id.* Neither of these "rights" comes close to the authority mandated by the Elections Clause—prescribing the time, place, and manner of congressional elections. As this Court observed in *Smiley*, the conferral of authority to state legislatures by the Elections Clause is broad:

> It cannot be doubted that these comprehensive words embrace authority to provide ***a complete***

> ***code for congressional elections***, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, ***to enact the numerous requirements*** as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. ***All this is comprised in the subject of 'times, places and manner of holding elections,' and involves lawmaking in its essential features and most important aspect***.

Smiley, 285 U.S. at 366 (emphasis added). The vestige of redistricting influence now left to the Legislature by Prop. 106 falls far short of the ability to prescribe a "complete code" or engage in the "essential features" of lawmaking.

First, the Legislature does not select the IRC commissioners. Between the House and Senate the Legislature has a total of 90 members. Under Prop. 106, just four members of the Legislature (the majority and minority leaders from each chamber) have the ability to nominate individuals to the IRC. Neither chamber has a vote in the process. Moreover, even the four legislators who do make appointments have a very limited role. They cannot appoint whomever they choose. Their selection (and the ultimate selection of

the IRC's fifth member and chair) must come from a list of ten individuals, pre-selected by the Arizona Commission on Appellate Court Appointments. Ariz. Const. art. IV, pt. 2, § 6, ¶¶ 3-6 (App. 29-31).

Second, the Legislature's limited ability to submit suggestions for changes to the IRC's draft maps is a function without consequence. Ostensibly, the IRC is required to "consider" any legislative suggestions, but there is no consequence if it does not. And it may summarily reject them. *Id.* at ¶¶ 14, 16-17 (App. 33-34). There is no meaningful difference between the Legislature's ability to make suggestions to the IRC, and that of any member of the public. In short, the IRC is called "Independent" because it alone holds the authority to prescribe congressional district lines. Judge Rosenblatt's criticism of the majority panel's logic is correct:

> [S]uch minor procedural influences must be evaluated in light of the fact that Proposition 106 requires Plaintiff to choose IRC members from a list selected not by it but by the state's commission on appellate court appointments, and the fact that the IRC has the complete discretion not to implement any map changes suggested by Plaintiff. What Plaintiff does not have under Proposition 106 is the ability to have any outcome-defining effect on the congressional redistricting process.

App. 22-23 (Rosenblatt, J. dissenting). Indirect influence is a far cry from "outcome-defining effect."

C. The District Court Incorrectly Applied This Court's Remedial-Adjudication Precedents

The panel majority states that this Court has "reaffirmed that a state may place the redistricting authority in entities other than the legislature." App. 16. The decisions cited by the panel majority, however, do not go so far.

This Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993), addressed the extent to which a district court should engage in congressional and legislative redistricting when there is ongoing state-court litigation. This Court reversed an order by a district court that enjoined a state court's redistricting plan after the plan adopted by the Minnesota Legislature was vetoed. 507 U.S. at 30, 42. This Court reiterated the longstanding principle that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Id.* at 34.

The panel majority highlights this Court's use of the phrase "legislature or other body" in the *Growe* decision. App. 16. But that language, which this Court quoted from its decision in *Chapman v. Meier*, 420 U.S. 1 (1975), is a summary of a line of cases, all standing for the proposition that when a ***state legislature*** is unable or unwilling to produce a valid redistricting plan ***the courts*** are justified in providing remedial relief. *See*, *Chapman*, 420 U.S. at 27 (citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional

requisites in a timely fashion after having had an adequate opportunity to do so.") *and Maryland Comm. v. Tawes*, 377 U.S. 656, 676 (1964) (" Since primary responsibility for legislative apportionment rests with the legislature itself and since adequate time exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so.")).

There is an important difference between the authority of judicial officers to remedy legislative failings to conduct proper redistricting and the underlying authority to conduct congressional redistricting itself. The panel majority is incorrect to use this Court's remedial-adjudication precedents to displace the foundational delegation of authority to state legislatures in the Elections Clause.

D. States Have Only Delegated Authority—Not Inherent Power—To Regulate Federal Elections

Arizona's authority over congressional elections derives solely from the Constitution itself. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 805 (1995). "[T]he States may regulate the incidents of...elections...only within the exclusive delegation of power under the Elections Clause." *Cook v. Gralike*, 531 U.S. 510, 523 (2001). The Elections Clause, as a standalone preemption provision, establishes its own balance between state and federal interests and resolves all conflicts in favor of the federal government. *Id.* Thus, the federalism principles that apply to the states' use

of their inherent police powers are limited in the Elections Clause context. *Arizona v. Inter-Tribal Council of Arizona*, __ U.S. __, 133 S.Ct. 2247, 2257 (2013).

As states have no inherent authority over congressional elections, the district court erred by holding that "the relevant inquiry..." in determining whether redistricting is valid under the Elections Clause is simply "whether the state has appropriately exercised its authority in providing for that redistricting." App. 18. A court cannot simply end its inquiry there, because the Elections Clause gave authority to the states to legislate only "within the limitations therein named." *Smiley*, 285 U.S. at 372. Every challenge to delegated state authority under the Elections Clause must therefore be resolved by looking to the Constitution to determine the scope of that authority. And the Constitution requires that the times, places and manner of congressional elections be made by "the Legislature."

Under this reasoning, it is clear that the Elections Clause acts as an explicit limitation on the delegated authority of the states. The Clause's grant of authority to the "Legislature" of each state is but one example of such limitation. *See* II.A *infra*. By removing the Legislature from Arizona's congressional redistricting process, Prop. 106 violates the Elections Clause. By extension, congressional maps created by the IRC, in abrogation of the Legislature's Constitutionally-delegated authority are unconstitutional. Token participation by the Legislature, such as a non-binding recommendation procedure, does not make Arizona's current redistricting process any nearer to being "by

the Legislature." Arizona cannot preempt by state constitutional amendment the Legislature's delegation of authority to regulate congressional elections in the U.S. Constitution. Prop. 106 fails the constitutional scrutiny that this Court applies under the Elections Cause.

II. THE CONTEXT AND HISTORY OF THE ELECTIONS CLAUSE DEMONSTRATE THAT IT IS AN EXPRESS DELEGATION OF AUTHORITY TO STATE LEGISLATURES AND A LIMITATION UPON THE ABILITY OF STATES TO DISSOLVE THAT DELEGATION.

The Framers deliberately involved state legislatures—and not just "the states"—in the process of conducting and regulating federal elections. Both the context of the Elections Clause, in light of the rest of the Constitution, and the history of the framing show a deliberate plan for ensuring that the federal government would be established and maintained through an orderly elections structure. The Framers rested some of the framework upon specific delegations to the agency of the state legislatures in particular. Consequently, states lack the authority to disrupt these express grants of authority by replacing the constitutional role of state legislatures with some other body or person.

A. The Elections Clause Is One Of Several Instances Where The Framers Chose To Delegate Authority To State Legislatures Rather Than Generally To The States

The Constitution reflects the fact that the creation and alignment of federal power took place against the

backdrop of the authority of the pre-existing states. The 1787 Constitution, the Bill of Rights, and the Civil War amendments frequently acknowledge and refer to "the states"

Less frequently, the Constitution specifically references local agencies of government other than the states themselves. Many of these specific references occur in the context of how federal officers who represent the states are to be elected or appointed. For example, Article I, section 2 specifies that vacancies in federal representation of any state should be filled by "the Executive Authority therof. " However, when it comes to the election of representatives of the states in the federal government, the Constitution spells out a prominent role for the state legislatures in particular. Prior to the adoption of the Seventeenth Amendment, Article I, section 3 granted state legislatures the authority to appoint United States Senators. Article II, section 1, gives state legislatures the authority to control the manner of appointment of presidential electors. And the Elections Clause—Article I, section 4—gives state legislatures the authority to prescribe the time, place, and manner of the elections of representatives and senators. Short of a Constitutional amendment, none of these powers are alienable. *See generally*, Mark R. Brown, *Structural Limitations on the Non-Legislative Regulation of Federal Elections*, 7 Dartmouth L. J. 260 (2009).

Because these grants of authority flow directly from the Constitution to the state legislatures, they cannot be displaced by the states themselves. In *McPherson v. Blacker*, for example, this Court struck down a state constitutional provision limiting the ability of the

Michigan Legislature to appoint presidential electors. This Court explained that Article II, section 1 operates as "a limitation upon the state in respect of any attempt to circumscribe the legislative power. . . " 146 U.S. 1, 25 (1892). Similarly, in *Bush v. Palm Beach County Canvassing Board*, this Court vacated and remanded an order by the Florida Supreme Court for the purpose of determining whether the state court had impermissibly used the state constitution to bypass the state legislature's enactment relating to the selection of Presidential electors. 531 U.S. 70, 76-78 (2000). The *McPherson* decision demonstrates an important principle of constitutional authority—delegations must be enforceable. When the Constitution grants authority specifically to state legislatures, it also creates a limitation of the state to "circumscribe" that authority.[5]

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[5] In *Hawke v. Smith*, this Court voided another attempt in a state constitution to "circumscribe" a delegation of constitutional authority to state legislatures—this time in the context of the constitutional amendment process set forth in Article V. 253 U.S. 221 (1920). "It is true," this Court explained, "that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented." *Id.* at 230.

B. The History Of The Elections Clause Demonstrates A Clear Grant Of Authority To State Legislatures, Not To A State's Legislative Process As A Whole

The District Court supports its expansive interpretation of the word "Legislature" in part by repeating the assessment of the Eleventh Circuit in *Brown v. Secretary of State*, that "[t]he Framers...said nothing that would help to resolve...what it means to repose a State's Elections Clause power in 'the Legislature thereof.'" 668 F.3d 1271, 1276 (11th Cir. 2012) (citations and quotations omitted).[6] App. 15. This alleged lack of evidence is vastly overstated. The text of the clause itself is sufficient evidence of its intended meaning. Additionally, the history of the Elections Clause likewise reveals the Framers' intent to specifically delegate authority over the times, places and manner of Congressional elections specifically to the elected legislatures of the states.

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[6] *Brown* involved a voter-initiative that imposed standards the Florida legislature was required to follow in the redistricting process. 668 F.3d at 1272. In upholding the initiative as a valid check on the legislature, the appellate court explicitly reaffirmed that "at the end of the day, Florida's legislature is still responsible for drawing the congressional district lines." *Id.* at 1281. The court further reasoned that "the standards imposed by the text of [the initiative]," could not be said to "so limit the state legislature's discretion as to eviscerate its constitutionally delegated power [i.e. from the Elections Clause] and effectively exclude the legislature from the redistricting process." *Id.* at 1280. In context, *Brown* actually supports the Legislature's argument—not the majority panel opinion—because Prop. 106 ***has*** eviscerated the Legislature's constitutionally delegated power.

1. Text of the Elections Clause

"The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Dist. of Columbia v. Heller*, 554 U.S. 570, 575 (2008) (citations and quotations omitted). "[W]here the intention is clear there is no room for construction and no excuse for interpolation or addition." *United States v. Sprague*, 282 U.S. 716, 731 (1931).

The term "Legislature" was not "one of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then ***the representative body which made the laws of the people.***" *Hawke v. Smith*, 253 U.S. 221, 227 (1920) (emphasis added). "There can be no question that the framers of the constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States." *Id.*; *accord Smiley*, 285 U.S. at 365 ("Legislature" as used in the Elections Clause refers to "the representative body which made the laws of the people"). The district court's distortion, especially in light of historical evidence of the plain meaning of the Elections Clause, impermissibly "strain[s] the constitutional text." *Williams v. Illinois*, __ U.S. __, 132 S. Ct. 2221, 2242 (2012).

2. Founding-Era Historical Record

In crafting the Elections Clause the Framers intentionally singled out state legislatures, as opposed to the general authority of the states, for the delegation of authority. This is borne out by the historical record.

a. Records of the Federal Convention

The genesis of the Elections Clause begins with the debate on the Fourth Resolution of Edmund Randolph's Virginia Plan, which provided that "the members of the first branch of the National Legislature ought to be elected by the people of the Several States..." 1 The Records of the Federal Convention of 1787, 420 (proceedings of May 30, 1787) (Max Farrand ed., 1911), *available at* http://files.libertyfund.org/files/1057/0544-01_Bk.pdf ("Records of the Federal Convention"). The controversy occasioned by this resolution focused primarily on whether it should be the people of the states, or their elected legislatures, that ultimately chose the members of the House of Representatives. James Madison, among others, argued for direct election by the people, stating that if the first branch of the federal legislature were elected by "...an intervening body of electors... the people would be lost sight of altogether." 1 Records of the Federal Convention at 49-50. Put to a vote, election by the people passed, 6 ayes, 2 noes, 2 divided. *Id.* 1 Records of the Federal Convention at 50.

The debate on this issue was reopened on June 6, 1787, by a motion "that the first branch of the national Legislature be elected by the State Legislatures, and not by the people." *Id.* at 132 (proceedings of June 6, 1787). Debate resumed along much the same lines as on May 31, 1787. Election by the people gained support in the intervening week, as the motion was defeated by a vote of 3 ayes, and 8 noes. *Id.* at 138.

On June 21, 1787, Charles Pinckney, a supporter of appointment of Representatives by the state legislatures, tried a new approach. He moved "that the

1st branch, instead of being elected by the people, sh[d] [sic] be elected in such manner as the Legislature of each State should direct." *Id.* at 358 (proceedings of June 21, 1787). Pinckney's proposal would have allowed that each state decide for itself whether the people would elect their representatives, and argued "that this liberty would give more satisfaction, as the Legislature could then accommodate the mode to the conveniency & opinions of the people." *Id.* The Delegates once again debated the balance of power between the people of the states and their elected legislatures, and Pinckney's motion failed—although this time with 4 ayes, 6 noes, and 1 divided. *Id.* at 360.

Perhaps spurred on by his increased support, Pinckney "immediately" made his final motion on the subject: "that the 1st branch ***be elected by the people in such mode as the Legislatures should direct***..." *Id.* (emphasis added). This final motion of June 21 is clearly the germ of the Elections Clause. Pinckney waived this final motion, when it was "hinted that such a provision might be more properly tried in the detail of the plan." *Id.* The motion, Pinckney's final attempt to entrust some part of the election of Representatives in the state legislatures, was in fact "tried in the detail." This compromise—direct election by the people, as directed by the elected state legislatures—was taken up by the Committee of Detail, and the first iteration of the Elections Clause emerged in written form from the Committee of Detail's report of August 6, 1787. William M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787*, 87-89 (1st ed. 1900) available at http://archive.org/stream/growthconstitut00meiggoog#page/n8/mode/2up.

The progression of these motions provides the key to understanding the Founders' intent in composing the Elections Clause. Pinckney and others preferred to elevate the state legislatures' role in the process of Representative elections for two reasons. First, they felt that the people were "less fit Judges," and that by authorizing the state legislatures "more refined, and better men [would] be sent." 1 Records of the Federal Convention at 132, 365. Second, and perhaps more importantly, they hoped to curb the perceived problem that once elected, federal officers forget local concerns and become "strictly federal." *Id.* at 365. They therefore sought to make "State Govts. a part of the General System," in order to protect the interests of less populous states (such as Pinckney's own South Carolina) within the new federal government. *Id.*

When he could not dissuade the majority of delegates from their favored mode of direct election of Representatives by the People, Pinckney suggested the compromise of a popular vote as directed by the state legislatures to ensure some measure of control over Representative elections. The delegation of authority over the "times, places and manner" of elections was thus a compromise between those Convention delegates that felt the need to influence the will of the people and to shore up state interests through the state legislatures, and those that saw the "popular elections of Representatives as essential to the Federal Government of one branch of the national Legislature as essential to every plan of free Government."

When the Committee of Details submitted their draft to the Committee on the Whole, Article VI, § 1 contained the Elections Clause in its essential form. 2

Records of the Federal Convention at 179 (proceedings of August 6, 1787). The Committee of Style and Arrangement gave the Elections Clause its current place in Art. I, § 4, and nearly its current language. *Id.* at 592. The Clause achieved its final form on September 14, 1787, when, apparently without argument, the Convention amended Art. I, § 4 to add "except as to the places of chusing Senators" as an exception to Congress' general oversight authority. *Id.* at 613.

Tracing the history of the elections clause through the Federal Convention reveals that the Clause represents a compromise to satisfy those that favored election of Representatives by the state legislatures by giving the legislatures a baseline of authority over the times, places and manner of elections. Nothing in the historical record supports the district court's opinion that "Legislature" in fact means "general legislative power."

b. The Federalist

The intent of the Founders with regard to their adopted language is apparent from their context and usage of the term "Legislature" when presenting the Elections Clause in their efforts to win support for ratification.

In The FEDERALIST NO. 44, for instance, James Madison discusses why state legislators should be required to swear an oath to uphold the federal constitution. Madison finds the answer to be "obvious and conclusive":

> The members and officers of the State governments...will have an essential agency in

> giving effect to the federal Constitution. The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance; and will, probably, forever be conducted by the officers, and according to the laws, of the States.

Madison observed that the Constitution specifically grants authority over congressional elections to state legislators, and saw this grant of authority as a justification for requiring state legislators to swear to uphold the Constitution.

Madison makes a similar argument in THE FEDERALIST NO. 45, regarding the degree to which the federal government is beholden to state governments:

> Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. ***Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures***. (emphasis added).

The emphasized portion necessarily refers to state legislatures' power under the Elections clause, as that is the only means they possess to influence the

choosing of Representatives. Madison understood that authority over the times, places and manner of Representative elections would cause Representative elections to be conducted "very much under the influence of" the elected state legislators. As with the records of the Federal Convention, THE FEDERALIST supports holding "Legislature" to mean exactly what it says.

The overwhelming textual and historical evidence makes obvious what the District Court mistakenly believed obscure: the word "Legislature" has historically meant, and still means, the elected representative body that makes the laws. The substantive role for state legislatures anticipated by the Elections Clause is clear. Arizona lacks the power to displace its Legislature from that role.

CONCLUSION

In violation of the Elections Clause, Prop. 106 divests the Legislature of its authority to determine the "manner" of congressional elections through redistricting. Congressional district maps created by the IRC pursuant to Prop. 106 are likewise unconstitutional. It took the Seventeenth Amendment to remove the state legislatures' ability to appoint United States Senators to Congress. It would take another ***federal*** constitutional amendment to remove the Legislature's ability to regulate the times, places and manner of congressional elections. Acting on its own, Arizona may not fully remove that authority.

The District Court erred in upholding a state constitutional provision that jettisons the Legislature from its constitutionally-delegated role in congressional

redistricting under the Elections Clause. For the foregoing reasons, this Court should note probable jurisdiction and ultimately reverse the District Court's judgment.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-01211-PHX-PGR-MMS-GMS

[Filed February 21, 2014]

Arizona State Legislature,	)
	)
Plaintiff,	)
	)
v.	)
	)
Arizona Independent Redistricting Commission, et al.,	)
	)
Defendants.	)

ORDER

Order by Snow. J.

This three-judge statutory court has jurisdiction pursuant to 28 U.S.C. § 2284(a). Pending before it are Defendants' Motion to Dismiss for Failure to State a Claim (Doc. 16), Plaintiff's Motion for Preliminary Injunction (Doc. 33), and Defendants' Motion to Dismiss for Lack of Jurisdiction for Lack of Standing (Doc. 43). For the following reasons, Defendants' Motion to Dismiss for Lack of Jurisdiction is denied, Defendants' Motion to Dismiss for Failure to State a

Claim is granted, and Plaintiff's Motion for Preliminary Injunction is denied as moot.

BACKGROUND

From the first year of its statehood in 1912 until 2000, the Arizona State Legislature ("Legislature") was granted the authority by the Arizona Constitution to draw congressional districts, subject to the possibility of gubernatorial veto. In 2000, Arizona voters, through the initiative power, amended the state Constitution by passing Proposition 106. Proposition 106 removed congressional redistricting authority from the Legislature and vested that authority in a new entity, the Arizona Independent Redistricting Commission ("IRC"). Ariz. Const. art. IV, pt. 2, § 1. Proposition 106 prescribes the process by which IRC members are appointed and the procedures the IRC must follow in establishing legislative and congressional districts. Once this process is complete, the IRC establishes final district boundaries and certifies the new districts to the Secretary of State. *Id.* at ¶¶ 16–17.

Under the IRC redistricting process, the legislative leadership may select four of the five IRC members from candidates nominated by the State's commission on appellate court appointments. The highest ranking officer and minority leader of each house of the legislature each select one member of the IRC from that list. *Id.* at ¶¶ 4–7. The fifth member, who is the chairperson, is chosen by the four previously selected members from the list of nominated candidates. The governor, with the concurrence of two-thirds of the senate, may remove an IRC member for substantial neglect of duty or other cause. *Id.* at ¶ 10. The IRC is required to allow a period for public comment after it

advertises a draft of its proposed congressional map during which it must review any comments received from either or both bodies of the Legislature. *Id.* at ¶ 16.

On January 17, 2012, the IRC approved a final congressional map to be used in all congressional elections until a new IRC is selected in 2021 and completes the redistricting process for the next decade. Ariz. Const. art. IV, pt. 2, § 1 ¶¶ 5, 17.

On June 6, 2012, the Legislature filed the present suit against the IRC, its current members, and the Arizona Secretary of State. (Doc. 1.) In its First Amended Complaint, the Legislature seeks a judgment declaring that Proposition 106 violates the Elections Clause of the United States Constitution by removing congressional redistricting authority from the Legislature and that, as a result, the congressional maps adopted by the IRC are unconstitutional and void. (Doc. 12 at 9.) The Legislature also asks the Court to permanently enjoin Defendants from adopting, implementing, or enforcing any congressional map created by the IRC, beginning the day after the 2012 congressional elections. (*Id.*) Defendants move to dismiss on the grounds that Plaintiff fails to state a claim (Doc. 16) and lacks standing to bring this action (Doc. 43). Plaintiff moves for a preliminary injunction. (Doc. 33.) The Court held a consolidated hearing before a three-judge panel on these motions on January 24, 2014.

DISCUSSION

I. Legal Standard

Rule 12(b)(6) is designed to "test[] the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). While "a complaint need not contain detailed factual allegations it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "However, conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). Here, none of the essential facts of Plaintiff's claim are subject to dispute. The parties dispute only the proper legal interpretation of the Elections Clause of the United States Constitution, in light of Supreme Court precedent.

II. Plaintiff's Claim is Justiciable and Not Barred by Laches or by State Law

As preliminary matters Defendants assert that: (1) Plaintiff lacks standing to bring its First Amended Complaint (Doc. 43), (2) Plaintiff's claims should be barred by the doctrine of laches (Doc. 16 at 11), and (3) Plaintiff's First Amended Complaint presents a non-justiciable political question (Doc. 37 at 13). Finally, the Amici assert that this claim is barred by the Arizona Voter Protection Act. (Doc. 42.)

Plaintiff has standing to bring the present action. It has demonstrated that its loss of redistricting power constitutes a concrete injury, unlike the "abstract dilution of institutional legislative power" rejected by

the Supreme Court as a basis for legislature standing. *Raines v. Byrd*, 521 U.S. 811, 826 (1997) (holding that members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act). Here, Proposition 106 resulted in the Legislature losing its authority to draw congressional districts even if it retains some influence over the redistricting process via other means. In addition, prior Supreme Court precedent strongly suggests that the Plaintiff has suffered a cognizable injury. The Court has twice entertained challenges raised by state officials under the Elections Clause. *See Smiley v. Holm*, 285 U.S. 355 (1932); *Davis v. Hildebrant*, 241 U.S. 565 (1916). In neither did the Court refuse to address the merits for lack of standing.

Nor does laches bar the present action, at least at this stage of the litigation. To establish laches, a "defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself." *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1226 (9th Cir. 2012) (quoting *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000)). "[A] claim of laches depends on a close evaluation of all the particular facts in a case" and thus is rarely appropriate for resolution at the motion to dismiss phase. *Kourtis v. Cameron*, 419 F.3d 989, 1000 (9th Cir. 2005) *abrogated on other grounds by Taylor v. Sturgell*, 553 U.S. 880 (2008). In addition, courts are hesitant to apply laches against state entities or agencies to the extent that it would limit a full exploration of the public interest, or governmental or sovereign functions. *See United States v. Ruby Co.*, 588 F.2d 697, 705 (9th Cir. 1978); *Mohave Cnty. v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 421, 586 P.2d 978, 982 (Ariz. 1978). Further, "it would

be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under [an] invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

In asserting the defense of laches at this stage, "the defendant must rely exclusively upon the factual allegations set forth in the complaint." *Kourtis*, 419 F.3d at 1000. Here, it is unclear based on the facts set forth in the complaint whether Plaintiff's delay in filing this action was unreasonable or whether or to what extent Defendants were prejudiced by this delay. Thus, Defendants have failed to establish a laches claim sufficient to prevail on a motion to dismiss.

Additionally, as will be further explained below, the Court is not barred from determining whether the Elections Clause of the United States Constitution, U.S. Const, art. I § 4, prohibits state voters from amending the Arizona Constitution to place the congressional re-districting function in the IRC. To the extent, however, that the Legislature makes arguments that the IRC cannot be the repository of legislative authority because it is not a representative body, such arguments arise under the republican guarantee clause of the Constitution and, as such, are not justiciable. *Ohio ex. rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916) (citing *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U.S. 118 (1912)).

Finally, the Amici assert that this action is barred by the Arizona Voter Protection Act ("VPA") which states that the Legislature "shall not have the power to repeal an initiative measure approved by a majority of the votes cast" and "shall not have the power to amend an initiative measure . . unless the amending

legislation furthers the purposes of such measure and at least three-fourths of the members of each house . vote to amend such measure." Ariz. Const., art. IV, pt.1, § 1, ¶¶ 6(B) - (C), The Amici argue that this suit is barred because both houses of the Legislature authorized filing this action, and thus it constitutes legislative action to repeal Proposition 106. (Doc. 42 at 8.) However, the text of the VPA clearly refers to the Legislature passing a bill to repeal or amend a duly approved initiative matter, not the filing of a lawsuit that asserts such an initiative is invalid as it violates the United States Constitution. Thus, Plaintiff's action is not barred by the VPA.

III. The Elections Clause Does Not Prohibit Arizona From Using Its Lawmaking Process to Give Congressional Redistricting Authority to the IRC

No material facts related to the merits of this lawsuit are in dispute. Neither party contests that, since its inception, the Arizona Constitution has reserved the initiative power to its people. Neither party contests that the initiative power is a legislative power. Ariz. Const. art. IV, pt.1, § 1(1) ("[T]he people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature . ").[1] Neither party contests that the

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[1] In addition, the initiative power is contained within article IV, the legislative article of the Arizona Constitution. This was also the case with the provisions at issue in *Brown*, *Hildebrant*, and *Smiley*, discussed below. *Smiley v. Holm*, 285 U.S. 355, 363 (1932);

people of Arizona used that legislative power to create the IRC. Neither party contests that the IRC is a separate entity from the Legislature. Neither party can effectively contest that in fulfilling its function of establishing congressional and legislative districts, the IRC is acting as a legislative body under Arizona law. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 594–95, ¶ 19, 208 P.3d 676, 683–84 (2009). Neither party contests the Legislature's role in selecting the members of the IRC, or in suggesting modifications to the IRC's redistricting plan.

What the parties dispute is the meaning of the Elections Clause of the United States Constitution. That clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const, art. I, § 4, cl.1.

Plaintiff asserts that because the word "legislature" means "the representative body which makes the laws of the people," (Doc. 12 at ¶ 37), and the Clause allows the legislature to prescribe the time, place and manner of holding elections for congresspersons, the Clause specifically grants the power to realign congressional

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Hildebrant, 241 U.S. at 566; *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1279, n.7 (11th Cir. 2012).

districts to the legislature.[2] The Supreme Court, however, has at least twice rejected the notion that when it comes to congressional redistricting the Elections Clause vests only in the legislature responsibilities relating to redistricting. Both cases found that states were not prohibited from designing their own lawmaking processes and using those processes for the congressional redistricting authorized by the Clause. In subsequent cases, the Supreme Court has reaffirmed that a state can place the redistricting function in state bodies other than the legislature.

In the first case, *Ohio ex. rel. Davis v. Hildebrant*, the Ohio state constitution reserved to its voters the legislative power to approve or disapprove by popular vote any law passed by the state legislature. 241 U.S. 565, 566 (1916). Ohio voters used this referendum power to disapprove of a congressional redistricting plan drawn by the state legislature. *Id.* In response, a mandamus action was brought against state election officials to direct them to disregard that vote and proceed as if the redistricting plan passed by the legislature remained valid. *Id.* The petitioner's argument was "based upon the charge that the referendum vote was not and could not be part of the legislative authority of the state, and therefore could have no influence on the subject of the law creating

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[2] It is not clear if any court has explicitly decided that the "Time, Places and Manner of holding Elections" includes authority to conduct congressional redistricting. However, Supreme Court precedent has assumed this authority is included within the Clause, without undertaking a detailed textual analysis of the question. *See, e.g., Smiley v. Holm*, 285 U.S. 355 (1932); *Ohio ex. rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

congressional districts." *Id.* at 567. Specifically, the petitioner argued that to allow the referendum to block the legislature's plan would violate both the Elections Clause and the controlling act of Congress. *Id.* The State Supreme Court "held that the provisions as to referendum were a part of the legislative power of the state, made so by the [state] Constitution, and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary, and that therefore the disapproved [redistricting] had no existence and was not entitled to be enforced by mandamus." *Id.*

In reviewing this decision, the United States Supreme Court first looked to the power of the state and explained that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power," and thus the claim that the rejected plan nonetheless remained valid despite the referendum was "conclusively established to be wanting in merit." *Id.* at 568.

Next, the Court looked to how Congress had spoken on the issue under its own Elections Clause power to make or alter state regulations, remarking that the act of 1911 had "expressly modified the phraseology of the previous acts relating to [redistricting] by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Id.* at 568. The Court noted that while the earlier federal statute relating to apportionment had described redistricting by "the

legislature" of each state, the 1911 act modified this language, describing redistricting be done by states "in the manner provided by the laws thereof." *Id.* The Court further noted that "the legislative history of this [1911 act] leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, so far as Congress has power to do it, of excluding" the argument made by petitioner. *Id.* at 568–69.

Finally, the Court considered whether the act of 1911 may itself have violated the Elections Clause. In doing so the Court declined to hold that the Clause granted redistricting authority uniquely to the state legislature as opposed to any other entity, including the people, which the state may have endowed with "legislative power." Thus the Court observed that the argument that Congress had violated the Elections Clause by authorizing re-districting to be accomplished "in the manner provided by the laws [of the state]" including referendum as it had been used in Ohio to reject the legislature's redistricting map, "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government." *Id.* at 569. The Court further noted that the question of whether legislative procedures such as the referendum that Ohio had adopted violated the republican guarantee clause "presents no justiciable controversy." *Id.* (citing *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U.S. 118 (1912)).

Had the Court interpreted the Elections Clause as requiring that redistricting authority was vested

uniquely in the legislature as opposed to giving the states discretion of where to place such authority within the scope of the "state's legislative power," there would have been no need for the Court to hold that the question of granting the people of Ohio the right to participate in congressional redistricting through the referendum power was not justiciable. Thus, in affirming the State Supreme Court's denial of the writ of mandamus in favor of the validity of the referendum, the Court necessarily held that to the extent that the Elections Clause vested some constitutional authority in a state to re-district national congressional districts, that authority was vested in the operation of a state's legislative power; not necessarily in the state legislature. It further held that questions as to whether the exercise of democratic forms of legislative authority violated the Guarantee Clause were political questions to be directed to Congress and not to the Courts. *Id.*

Sixteen years later, the Court considered this same question in the context of a gubernatorial veto. *Smiley v. Holm*, 285 U.S. 355 (1932). In *Smiley*, the Minnesota legislature approved a redistricting plan and, as permitted under the Minnesota constitution, it was vetoed by the Governor. The Secretary of State asserted that the legislature had the sole authority to redistrict under the Elections Clause and thus its map was valid despite the veto. *Id.* at 362–63. The State Supreme Court agreed, and held that in exercising the redistricting power which had been conferred upon it by the Elections Clause, the legislature was not exercising a legislative power. *Id.* at 364. Rather it was acting as an agent of the federal government with federal power delegated to it by the Elections Clause to redistrict the federal congressional districts within the

state. *Id.* Because the Constitution's delegation was of federal power, the state court held that it did not constitute state legislative power, and the legislature's redistricting decision was thus not subject to gubernatorial veto, as were other state legislative acts. *Id.* at 364–65.

The United States Supreme Court rejected this holding. It explained that "[t]he question then is whether the provision of the Federal Constitution . . . invests the Legislature with a particular [federal] authority and thus renders inapplicable the conditions which attach to the making of state laws." *Id.* at 365. It noted that the function to be performed under the Elections Clause is to prescribe the time, place and manner of holding elections. "As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367. The Court found "no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 367–68. Thus, the use of a gubernatorial veto "is a matter of state polity" that the Elections Clause "neither requires nor excludes." *Id.*

The Court went on to explain that while "[g]eneral acquiescence cannot justify a departure from the law," "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning." *Id.* at 369. Here, "the terms

of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practices in the states." *Id.* The Court then described its earlier opinion in *Hildebrant*, explaining that "it was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections, was sustained." *Id.* at 372. Looking to Minnesota's use of the gubernatorial veto, "[i]t clearly follows that there is nothing in [the Elections Clause] which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." *Id.* at 372–73. The Court upheld the use of the veto and reversed the state court. *Id.*

Hildebrant and *Smiley* thus demonstrate that the word "Legislature" in the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws. Other Courts have arrived at the same conclusion. "The Supreme Court has plainly instructed . . . that this phrase ['the Legislature'] encompasses the entire lawmaking function of the state." *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1278-79 (11th Cir. 2012).

The Supreme Court has further made clear that, in appropriate instances, a state court has authority to formulate a congressional redistricting plan. In reinstating an interim congressional redistricting plan that was ordered by a state court to correct flaws in a legislative redistricting plan, the Supreme Court

reaffirmed that a state may place the redistricting authority in entities other than the legislature. "We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature ***or other body,*** rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)) (emphasis added). *See also Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam) (holding in a state reapportionment case that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.")

The Arizona Constitution allows multiple avenues for lawmaking and one of those avenues is the ballot initiative, as employed here through Proposition 106. Plaintiff notes that the ballot initiative is not one of the four constitutionally-defined processes by which the Legislature itself may enact laws (Doc. 17 at 11), but it cannot dispute that the Arizona Constitution specifies that the initiative power is legislative. Ariz. Const. art. IV, pt. 1, § 1, ¶ 1 ("The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature."). *Cf. Brown,* 668 F.3d at 1279 ("Like the veto provisions at issue in *Hildebrandt* and *Smiley,* Florida's citizen initiative is every bit a part of the state's lawmaking function.").

The Legislature argues that the IRC cannot constitute "the Legislature" as that term is used in the Elections Clause, because the IRC is not a representative body. As *Hildebrant* and *Smiley* both demonstrate, however, the relevant inquiry is not whether Arizona has uniquely conferred its legislative power in representative bodies, it is whether the redistricting process it has designated results from the appropriate exercise of state law. There is no dispute that the IRC was created through the legislative power reserved in the people through the initiative with the specific purpose of conducting the redistricting within the state, and that in exercising its functions the IRC exercises the state's legislative power. *Ariz. Minority Coal.*, 220 Ariz. at 597, ¶ 19, 208 P.3d at 683–84. To the extent that this argument is a veiled assertion that the IRC violates the Guarantee Clause, the argument is not justiciable. *Hildebrant*, 241 U.S. at 569 (citing *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U.S. 118 (1912)). Similarly unjusticiable is any argument that the people's exercise of their initiative power in the re-districting setting is not a republican exercise of legislative power.[3]

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[3] The Legislature also includes within its briefing citations to the debates at the Constitutional Convention, and other historical materials, to illustrate that the Framers knew the difference between the legislature and the people. Nevertheless such citations arise from other contexts and do not shed any particular light on the present question. As the court in *Brown* observed, "[t]he Framers said precious little about the first part of the Clause, and they said nothing that would help to resolve the issue now before us: what it means to repose a Sate's Elections Clause power in "the Legislature thereof." *Brown*, 668 F.3d at 1276. None of the legislative history provided by the Legislature in this case changes the *Brown* Court's assessment.

Plaintiff attempts to distinguish this case from *Hildebrant* and *Smiley*. Plaintiff apparently recognizes, in light of *Hildebrant* and *Smiley*, that the Elections Clause does not give unique authority to state legislatures to conduct redistricting. It nevertheless asserts that Arizona has gone too far in excluding the Legislature from congressional redistricting, as opposed to merely placing checks on that power. It argues, without setting forth any authority that would establish such constitutional limits, that "[n]o state can constitutionally divest its Legislature entirely of the redistricting authority conveyed by Article I, Section 4." (Doc. 12 at ¶ 38.) This argument is inconsistent with the Court's observations in *Growe* that states can place redistricting authority in other state entities and appears to be primarily based on dicta in *Brown*. But, in that case, as opposed to this one, Florida voters had only used their initiative power to create binding instructions for the legislature to follow in its congressional redistricting. 668 F.3d at 1273. They did not vest the primary redistricting responsibility in another state entity. Thus, the *Brown* Court observed that in the case of the Florida initiative, the standards imposed on the legislature did not go so far as to "effectively exclude the legislature from the redistricting process." *Id.* at 1280.

Nevertheless, that dicta does not apply to the present case or flow from the analysis adopted in *Hildebrant* and *Smiley*. *Brown* recognized as much. Those cases make it clear that the relevant inquiry is not what role, if any, the state legislature plays in redistricting, but rather whether the state has appropriately exercised its authority in providing for that redistricting. As the Supreme Court stated in

Smiley, the Elections Clause includes no "attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." 285 U.S. at 367–68. Thus, the Elections Clause does not prohibit a state from vesting the power to conduct congressional districting elsewhere within its legislative powers. The *Brown* Court also adopted this analysis, explaining that the Supreme Court's decisions in *Hildebrant* and *Smiley* "provided a clear and unambiguous answer . . . twice explaining that the term 'Legislature' in the Elections Clause refers not just to a state's legislative body but more broadly to the entire lawmaking process of the state." 668 F.3d at 1276.[4]

In Arizona the lawmaking power plainly includes the power to enact laws through initiative, and thus the Elections Clause permits the establishment and use of the IRC. Therefore,

IT IS ORDERED THAT Defendants' Motion to Dismiss for Failure to State a Claim (Doc. 16) is **granted**.

IT IS FURTHER ORDERED THAT Defendants' Motion to Dismiss for Lack of Jurisdiction for Lack of Standing (Doc. 43) is **denied**.

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[4] Arizona has not entirely divested the legislature of any redistricting power. The Legislature retains the right to select the IRC commissioners, and the IRC is required to consider the Legislature's suggested modifications to the draft maps. Ariz. Const. art. IV, pt. 2, § 1 ¶¶ 6, 10, 16.

IT IS FURTHER ORDERED THAT Plaintiff's Motion for Preliminary Injunction (Doc. 33) is **denied as moot**.

Dated this 21st day of February, 2014.

I certify that Circuit Judge Mary M. Schroeder concurs with this Order.

/s/_____
G. Murray Snow
United States District Judge

Rosenblatt, District Judge, concurring in part and dissenting in part:

I concur with the majority's conclusions that the present action is justiciable, that Plaintiff has standing to bring it, and that Plaintiff's claims are not barred by the Arizona Voter Protection Act, and I join in those portions of the majority's opinion. I also concur with the majority's conclusion that Plaintiff's action is not barred by the doctrine of laches, although I believe that the issue can be resolved simply on the ground that laches cannot be appropriately applied to bar this action, no matter its procedural stage, given the public's overriding interest in having the Elections Clause issue litigated and resolved.

I respectfully dissent, however, from the majority's conclusion that the Elections Clause permits Arizona to use its lawmaking process to divest Plaintiff of its redistricting authority in the manner adopted by Proposition 106. I believe that the extent of Arizona's delegation of redistricting authority to the Independent Redistricting Commission ("IRC") extends beyond the state's constitutional authority to do so, and I would

declare that Proposition 106 violates the Elections Clause, art. 1, § 4, cl. 1 of the United States Constitution and that the congressional maps adopted by the IRC under that unconstitutional authority are null and void, and I would enjoin their use.

States have the authority to regulate the mechanics of congressional elections only to the extent delegated to them by the Elections Clause. *Cook v. Gralike*, 531 U.S. 510, 522–23 (2001). Among the powers constitutionally delegated to them is the primary responsibility for the apportionment of their congressional districts. *Growe*, 507 U.S. at 34. The Elections Clause mandates that the times, places, and manner of holding congressional elections "shall be prescribed in each State by the Legislature thereof[.]" It cannot be disputed that the Elections Clause's reference to "the Legislature," as that term has been interpreted by the Supreme Court, refers to the totality of a state's lawmaking function as defined by state law, and that in Arizona a citizen initiative, such as that used to enact Proposition 106 to amend the state constitution, is an integral part of the state's legislative process. But the fact that Arizona has appropriately used its initiative process to establish the IRC cannot be the end of the inquiry under the Elections Clause, as found by the majority, because it also cannot be disputed that any law passed by a state, whether through an initiative or referendum or directly by the legislature, must abide by the United States Constitution.

That the Supreme Court has concluded that the Election Clause properly permits a state to include some other state entity or official in the redistricting

process as a limiting check on its legislature's role in that process does not mean that the Elections Clause places no limit on a state's authority to define the legislative process it uses to regulate redistricting. I find it instructive that the scant case law permitting non-legislature entities to participate in the redistricting process, for example *Hildebrant*, 241 U.S. 565, *Smiley* 285 U.S. 355, and *Brown*, 668 F.3d 1271, all involved situations in which the state legislature participated in the redistricting decision-making process in some very significant and meaningful capacity. For example, in *Hildebrant*, the state legislature's congressional redistricting act was rejected by the voters through a referendum; in *Smiley*, the state legislature's congressional districts maps were vetoed by the governor; and in *Brown*, the state legislature created the congressional district maps based on guidelines for redistricting enacted through an initiative. In short, these cases all involved constraints on the ability of the state legislature to redistrict, and none directly held that the Elections Clause can be so broadly interpreted as to permit a state to remove all substantive redistricting authority from its legislature. Proposition 106 overreaches under the Elections Clause because the initiative's acknowledged and undisputed purpose was to supplant Plaintiff's constitutionally delegated authority to redistrict by establishing the IRC as Arizona's sole redistricting authority.

The majority notes that Proposition 106 does not entirely divest Plaintiff of its redistricting participation inasmuch as it permits Plaintiff to retain some ability to influence the redistricting process. The majority points out that Plaintiff's majority and minority leaders

pick four of the five IRC members and that the IRC is required to consider any modifications to its draft redistricting maps suggested by Plaintiff. But such minor procedural influences must be evaluated in light of the fact that Proposition 106 requires Plaintiff to choose IRC members from a list selected not by it but by the state's commission on appellate court appointments, and the fact that the IRC has the complete discretion not to implement any map changes suggested by Plaintiff. What Plaintiff does not have under Proposition 106 is the ability to have any outcome-defining effect on the congressional redistricting process. I believe that Proposition 106's evisceration of that ability is repugnant to the Elections Clause's grant of legislative authority.

Dated this 21st day of February, 2014.

/s/ _____
Paul G. Rosenblatt
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 12-1211-PHX-PGR-MMS

[Filed February 24, 2014]

Arizona State Legislature,	)
	)
Plaintiffs,	)
	)
v.	)
	)
Arizona Independent Redistricting Commission, et al,	)
	)
Defendants.	)
	)

JUDGMENT IN A CIVIL CASE

XX **Decision by Court**. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order of February 21, 2014, granting Defendants' Motion to Dismiss, judgment is hereby entered for Defendants. Plaintiff shall take nothing by way of the Amended Complaint. The Amended Complaint and this action are hereby dismissed.

February 24, 2014
Date

BRIAN D. KARTH
DCE/Clerk of Court

s/ Ruth E. Williams
By Ruth E. Williams
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. 2:12-CV-01211-PGR-MMS-GMS

[Filed February 26, 2014]

Arizona State Legislature,	)
	)
Plaintiff,	)
	)
v.	)
	)
Arizona Independent Redistricting Commission, et al.,	)
	)
Defendants.	)
	)

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Attorneys for Plaintiff Arizona State Legislature

PLAINTIFF'S NOTICE OF APPEAL PURSUANT TO 28 U.S.C. § 1253

NOTICE IS HEREBY GIVEN that Plaintiff, Arizona State Legislature, hereby appeals to the Supreme Court of the United States from the Judgment [Dkt. 53] of the three-judge statutory court comprised of the Honorable Paul G. Rosenblatt, the Honorable Mary M. Schroeder, and the Honorable G. Murray Snow, entered in this action on the 24th day of February, 2014, granting Defendants' Motion to Dismiss for Failure to State a Claim and denying Plaintiff's Motion for Preliminary Injunction. This appeal is taken pursuant to 28 U.S.C. § 1253.

RESPECTFULLY SUBMITTED this 26th day of February, 2014,

ARIZONA STATE LEGISLATURE

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* * * Certificate of Service omitted in printing this appendix * * *

APPENDIX D

RELEVANT CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Art. I, § 4, cl. 1

The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

Ariz. Const. art. IV, pt. 2 § 1(3) - (23)

1. Senate; house of representatives; members; special session upon petition of members; congressional and legislative boundaries; citizen commissions

Section 1. * * *

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more

years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

(4) The commission on appellate court appointments shall nominate candidates for appointment to the independent redistricting commission, except that, if a politically balanced commission exists whose members are nominated by the commission on appellate court appointments and whose regular duties relate to the elective process, the commission on appellate court appointments may delegate to such existing commission (hereinafter called the commission on appellate court appointments' designee) the duty of nominating members for the independent redistricting commission, and all other duties assigned to the commission on appellate court appointments in this section.

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with

ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. Each such official shall have a seven-day period in which to make an appointment. Any official who fails to make an appointment within the specified time period will forfeit the appointment privilege. In the event that there are two or more minority parties within the house or the senate, the leader of the largest minority party by statewide party registration shall make the appointment.

(7) Any vacancy in the above four independent redistricting commission positions remaining as of March 1 of a year ending in one shall be filled from the pool of nominees by the commission on appellate court appointments or its designee. The appointing body shall strive for political balance and fairness.

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any

party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or its designee, striving for political balance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair.

(9) The five commissioners shall then select by majority vote one of their members to serve as vice-chair.

(10) After having been served written notice and provided with an opportunity for a response, a member of the independent redistricting commission may be removed by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

(11) If a commissioner or chair does not complete the term of office for any reason, the commission on appellate court appointments or its designee shall nominate a pool of three candidates within the first thirty days after the vacancy occurs. The nominees shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment, and the appointment other than the chair shall be made by the current holder of the office designated to make the original appointment. The appointment of a new chair shall be made by the remaining commissioners. If the appointment of a replacement commissioner or chair is not made within fourteen days following the presentation of the nominees, the commission on appellate court appointments or its designee shall make the

appointment, striving for political balance and fairness. The newly appointed commissioner shall serve out the remainder of the original term.

(12) Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting commission shall conduct business in meetings open to the public, with 48 or more hours public notice provided.

(13) A commissioner, during the commissioner's term of office and for three years thereafter, shall be ineligible for Arizona public office or for registration as a paid lobbyist.

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

A. Districts shall comply with the United States Constitution and the United States voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;

F To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

(16) The independent redistricting commission shall advertise a draft map of congressional districts and a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. Either or both bodies of the legislature may act within this period to make recommendations to the independent redistricting commission by memorial or by minority report, which recommendations shall be considered by the independent redistricting commission. The independent redistricting commission shall then establish final district boundaries.

(17) The provisions regarding this section are self-executing. The independent redistricting commission shall certify to the secretary of state the establishment of congressional and legislative districts.

(18) Upon approval of this amendment, the department of administration or its successor shall

make adequate office space available for the independent redistricting commission. The treasurer of the state shall make $6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote.

(19) The independent redistricting commission, with fiscal oversight from the department of administration or its successor, shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(20) The independent redistricting commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the independent redistricting commission. The independent redistricting commission shall have sole authority to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan.

(21) Members of the independent redistricting commission are eligible for reimbursement of expenses pursuant to law, and a member's residence is deemed

to be the member's post of duty for purposes of reimbursement of expenses.

(22) Employees of the department of administration or its successor shall not influence or attempt to influence the district-mapping decisions of the independent redistricting commission.

(23) Each commissioner's duties established by this section expire upon the appointment of the first member of the next redistricting commission. The independent redistricting commission shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CV-12-01211-PHX-PGR

[Filed July 20, 2012]

Arizona State Legislature,	)
	)
Plaintiff,	)
	)
v.	)
	)
Arizona Independent Redistricting Commission, and Colleen Mathis, Linda C. McNulty, José M. Herrera, Scott D. Freeman, and Richard Stertz, members thereof, in their official capacities; Ken Bennett, Arizona Secretary of State, in his official capacity,	)
	)
Defendants.	)

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FIRST AMENDED COMPLAINT

Apportionment Matter: Three-Judge Panel Requested Pursuant to 28 U.S.C. § 2248

For its First Amended Complaint, the Arizona State Legislature alleges as follows:

NATURE OF THE ACTION

1. The Elections Clause of the United States Constitution delegates the authority over the redistricting of congressional districts to the Legislatures of the States. Contrary to this constitutional delegation, Proposition 106 (adopted in 2000) amended the Arizona Constitution – removing that authority from the Arizona State Legislature ("Legislature") and vesting it instead with the "Independent Redistricting Commission" ("IRC"). The

Legislature brings this action requesting the Court to a) declare that Proposition 106 is unconstitutional to the extent it removes congressional-redistricting authority from the Legislature, b) declare that the congressional district maps adopted by the IRC are unconstitutional, and c) enjoin the Defendants from enforcing or implementing any congressional redistricting plan from the IRC beginning the day after the 2012 congressional election is held in Arizona. Though the Legislature seeks permanent injunctive relief, it does not seek immediate relief as to the 2012 congressional election because the current IRC plan has already been certified and the 2012 election cycle is already well underway.

PARTIES

2. Plaintiff Arizona State Legislature is the elected-representative portion of the legislative authority of the State of Arizona. Ariz. Const. art. IV, pt. 1 § 1. The Legislature consists of the thirty-member State Senate and the sixty-member House of Representatives. On May 2, 2012, both chambers authorized the filing of this action by majority vote. *See* Exhibit A (excerpts from the Journals of the Senate and House). The Legislature is directly elected by the People of Arizona.

3. Defendant IRC is a commission established "to provide for the redistricting of congressional and state legislative districts." Ariz. Const. art IV, pt. 2, § 1 (¶ 3). The IRC can sue and be sued in "legal actions regarding [its] redistricting plan." *Id.* § 1 (¶ 20). The IRC consists solely of unelected appointees.

4. Defendants Colleen Mathis, Linda C. McNulty, José M. Herrera, Scott D. Freeman, and Richard Stertz currently hold office as members of the IRC and are named herein as defendants solely in their official capacities. All of these defendants reside within the District of Arizona.

5. Defendant Ken Bennett currently holds the office of Arizona Secretary of State, and is charged with certain official duties with respect to the conduct of Arizona elections, including receiving certified legislative and congressional districts from the IRC. Ariz. Const. art. IV, pt. 2, §1 (¶ 17). Defendant Bennett is named herein solely in his official capacity in view of his election responsibilities.

JURISDICTION

6. This court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1367, 2201, 2202, and 2284.

VENUE

7. Venue is proper in the District of Arizona under 28 U.S.C. § 1391.

THREE-JUDGE PANEL REQUESTED

8. Because this is an action "challenging the constitutionality of the apportionment of congressional districts," the Legislature requests that a three-judge court be convened pursuant to 28 U.S.C. § 2284 to try this action and to conduct all other proceedings as required by law.

FACTS

Redistricting Prior to Proposition 106

9. The United States Constitution mandates that the times, places, and manner of congressional elections "shall be prescribed in each State by the Legislature thereof. . . " U.S. Const. Art. I, § 4, cl. 1 (the "Elections Clause").

10. From 1912 to 2000, the Arizona Constitution recognized that the responsibility and authority of establishing both congressional and legislative district lines resided in the Legislature. Ariz. Const. art. XXII, § 12; art. IV, pt. 1, § 1 (West Historical Notes).

11. Prior to 2000, the Legislature established congressional lines in the following manner:

a. Redistricting measures were introduced as proposed legislation.

b. The proposed redistricting legislation was reviewed, and debated in a bi-partisan, joint committee on redistricting.

c. The proposed redistricting legislation, along with any recommended committee amendments, was recommended to the body as a whole, which had the power to either approve the recommendations of the joint committee or make any other changes.

d. Proposed redistricting legislation was read on three separate days on the floor, and after final passage, it was sent to the Governor for approval or disapproval, in accordance with Article IV, part 2, section 12 of the Arizona Constitution.

e. The Governor had the authority to approve, disapprove, or take no action on redistricting legislation. Ariz. Const. art. IV, pt. 2, § 12; art. V, § 7.

12. Not since 1981 has an Arizona Governor disapproved of redistricting legislation. In that year, Governor Bruce Babbitt vetoed legislative and congressional district lines approved by the Legislature. The Legislature called itself into special session and overrode the Governor's veto, pursuant to Article V, section 7 of the Arizona Constitution.

In 2000, Proposition 106 Removed the Legislature and the Governor from the Redistricting Process

13. On September 13, 1999, an organization identified as "Fair Districts, Fair Elections c/o Arizona Common Cause, Inc." filed an application with the Office of the Arizona Secretary of State to circulate initiative petitions.

14. On July 6, 2000, "Fair Districts, Fair Elections" successfully filed its eponymous initiative petition with the Arizona Secretary of State. Arizona Secretary of State, 2000 General Election: Ballot Measures, "Fair Districts, Fair Elections" http://www.azsos.gov/election/2000/General/ballotmeasures.htm (last visited June 4, 2012).

15. The application included the following short title:

> This citizen-sponsored Arizona Constitutional amendment will create a new "citizens' independent redistricting commission" to draw

> new legislative and congressional district boundaries after each U.S. Census. This amendment takes the redistricting power away from the Arizona Legislature and puts it in the hands of a politically neutral commission of citizens who are not active in partisan politics and who will serve without pay to create fair districts that are not "gerrymandered" for any party's or incumbent's advantage.

Id.

16. The Arizona Secretary of State designated the measure as Proposition 106 ("Prop. 106") and placed Prop. 106 on the 2000 general election ballot.

17. The measure passed with 56% of applicable votes cast. Arizona Secretary of State, *State of Arizona Official Canvass* (2000), http://www.azsos.gov/election/2000/General/Canvass2000GE.pdf (last visited June 7, 2012).

18. Prop. 106 amends Article IV, part 2, § 1 of the Arizona Constitution by striking language, adding language to pre-existing paragraphs, and inserting twenty-one new paragraphs. *See* Arizona Secretary of State, Ballot Propositions & Judicial Performance Review: November 7, 2000 General Election 54-55 (2000), http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf (last visited June 7, 2012).

19. Prop. 106 removes entirely from the Legislature the authority to prescribe legislative and congressional district lines and reassigns that authority wholly to the IRC – a new entity created by Prop. 106.

20. Prop. 106 also prescribes the process by which the IRC members are appointed and the process and procedures by which the IRC is to establish legislative and congressional district lines.

21. Prop. 106 eliminates entirely the Legislature's prescriptive role in congressional redistricting, and creates a new and extremely limited role:

a. An opportunity to submit nonbinding recommendations to the IRC (Ariz. Const. art. IV, pt. 2, § 1 (¶ 16)); and

b. The obligation to make appropriations for the operation of the IRC (*Id.* at § 1 (¶ 18)).

22. Prop. 106 gives each of the individual leaders of the Legislature—the Speaker and Minority Leader of the House of Representatives and the President and Minority Leader of the State Senate—one appointment to the five-member IRC. *Id.* at §1 (¶ 6).

23. The four legislative leaders must choose their four appointments from a pool of only ten persons created by the Commission on Appellate Court Appointments ("Appellate Commission"). *Id.* at § 1 (¶ 5). The Commission on Appellate Court Appointments is an appointed body that exists to screen nominees to Arizona's state-appellate courts, and submit those nominees to the Governor for appointment. Ariz. Const. art. VI. §§ 36 and 37.

24. If a legislative leader fails to make an appointment in the prescribed time frame, the Appellate Commission makes the appointment instead. Ariz. Const art. IV. pt. 2, § 1 (¶ 7).

25. The four appointed members of the IRC must then choose their own fifth and final member from a pool of only five persons created by the Appellate Commission. *Id.* at § 1 (¶ 8). If the four members of the IRC fail to select a fifth member, the Appellate Commission makes the selection instead. *Id.*

26. Once appointed, members of the IRC can only be removed by the Governor with concurrence of two-thirds of the Senate for "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." *Id.* at § 1 (¶ 10).

The IRC Certifies a New Congressional District Map in Arizona For 2012 and Beyond

27. On January 17, 2012, the IRC approved a "final congressional map" and forwarded it to the U.S. Department of Justice for preclearance. The same day, the IRC certified the congressional districts to the Arizona Secretary of State.

28. On April 9, 2012, the Department of Justice precleared the IRC's congressional maps.

29. Under the framework of Prop. 106, the Arizona Secretary of State must use the IRC's congressional maps to conduct the congressional elections in 2012 and thereafter, until a new IRC is chosen in 2021. Ariz. Const. art. IV., pt. 2, § 1 (¶¶ 5, 17, and 23).

2012 Election Deadlines

30. The last day for candidates to file nomination petitions for the 2012 Primary Election was May 30, 2012. Ariz. Rev. Stat. § 16-311.

31. The Primary Election will be held on August 28, 2012. Early voting begins on August 2, 2012.

32. By law, the last day to transmit ballots to registered absent uniformed services voters and overseas voters is 45 days before the Primary Election, or July 14, 2012. Ariz. Rev. Stat. § 16-543.

CLAIM FOR RELIEF

33. Plaintiff adopts herein by reference all allegations of all preceding paragraphs.

34. An actual controversy exists within this Court's jurisdiction that would be resolved by a declaration of the rights and other legal relations of the parties in this action – namely, that Prop. 106 violates the Elections Clause of the United States Constitution.

35. The authority to prescribe the times, places, and manner of congressional elections arises exclusively under the Elections Clause of the United States Constitution. The States do not have the inherent authority to regulate federal elections.

36. The Constitution delegates and conveys the authority to prescribe the times, places, and manner of congressional elections only to "the Legislature" of "each state." U.S. Const. art. I, § 4, cl. 1. This delegation is a broad grant of power to the Legislature to prescribe the means by which congressional elections are held.

37. The word "Legislature" in the Elections Clause means the representative body which makes the laws of the people.

38. No State can constitutionally divest its Legislature entirely of the redistricting authority conveyed by Article I, Section 4.

39. Yet Prop. 106 removes entirely the constitutionally-delegated authority over prescribing the boundaries of congressional districts from the Arizona Legislature. In so doing, Prop. 106 conflicts directly with the United States Constitution and is therefore preempted, null and void.

40. Plaintiff is therefore entitled to judgment declaring that the provisions of Proposition 106 concerning congressional redistricting are null and void.

41. Plaintiff is therefore further entitled to judgment declaring that the congressional district maps adopted by the IRC are null and void.

42. Plaintiff is further entitled to a permanent injunction restraining adoption, implementation, or enforcement of any congressional district map created under Prop. 106, beginning the day after the 2012 general election.

RELIEF REQUESTED

The Legislature respectfully requests that the Court award it the following relief against all Defendants by:

A. Declaring that Proposition 106 violates the Elections Clause of the United States Constitution insofar as it removes the authority to prescribe the times, places, and manner of congressional elections from the Arizona Legislature, and therefore is preempted, null and void;

B. Declaring that the congressional district maps adopted by the IRC are unconstitutional and therefore null and void;

C. Enjoining Defendants and each of them permanently from adopting, implementing or enforcing any congressional map created under Proposition 106 beginning the day after the 2012 congressional election in Arizona, and

D. Awarding Plaintiff such other relief as is just, proper, or equitable under the facts and circumstances of this case.

DATED on July 20, 2012.

ARIZONA STATE LEGISLATURE

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* * * Certificate of Service omitted in printing this appendix * * *

EXHIBIT A

JOURNAL OF THE SENATE
Wednesday, May 2, 2012
One Hundred Fifteenth Day

The Senate session convened at 10:00 a.m. with President Pierce presiding.

Senator McComish offered prayer.

Pledge of Allegiance to the Flag was led by Senator Barto.

The following Senators answered on roll call:

PRESENT: Aboud, Allen, Antenori, Barto, Biggs, Burges, Cajero Bedford, Crandall, Gallardo, Gould, Gray, Griffin, Jackson, Landrum Taylor, Lewis, Lopez, McComish, Melvin, Meza, Reagan, Schapira, Shooter, Smith, Yarbrough, President Pierce--25

EXCUSED: Driggs, Klein, Lujan, Murphy, Nelson--5

Senator Lujan was seated at 11:21 a.m.
Senators Klein and Nelson were seated at 1:34 p.m.
Senator Murphy was seated at 1:37 p.m.
Senator Driggs was seated at 1:42 p.m.

JOURNAL

The President announced that without objection, reading of the Journal of Tuesday, May 1, 2012 was dispensed with and approved as recorded by the Secretary.

MESSAGES FROM THE HOUSE

President Pierce announced that without objection, Messages from the House as listed on the calendar would not be read. The messages would be entered in the Journal.

(May 1, 2012)
House concurred in Senate amendments and passed on Final Reading House Bills 2466 (60-0-0); 2713 (60-0-0); 2794 (58-2-0)

COMMITTEE OF THE WHOLE

Upon motion of Senator Biggs and agreed to, the Senate at 10:08 a.m. resolved itself into Committee of the Whole for consideration of the bill on the calendar with Senator Crandall in the chair.

Senator Biggs moved that during Committee of the Whole the debate be limited to no more than three minutes per Senator, speaking once per motion. The motion carried.

At 11:21 a.m., the Committee of the Whole was dissolved and Senator Crandall submitted the following recommendation:

House Bill 2571, do pass amended

Senator Crandall moved the report of the Committee of the Whole be adopted and the bill be properly assigned. The motion carried and House Bill 2571 was placed under Third Reading of Bills.

MESSAGES FROM THE HOUSE

President Pierce announced that without objection, Messages from the House as listed on the calendar

would not be read. The messages would be entered in the Journal.

(May 2, 2012)
House acceded to the Senate request and appointed Free Conference Committees to the following:

Senate Bill 1442 – Members Mesnard, Farley, Vogt
Senate Bill 1449 – Members Montenegro, Farley, Quezada

RECESS

At 11:24 a.m. the Senate stood at recess subject to the sound of the gavel.

RECONVENE

The President called the Senate to order at 1:39 p.m.

MESSAGES FROM THE HOUSE

President Pierce announced that without objection, Messages from the House as listed on the calendar would not be read. The messages would be entered in the Journal.

(May 2, 2012)
House adopted the Conference Committee Report on Senate Bill 1153

House passed on Third Reading Senate Bill 1407 (58-0-2) amended

House concurred in Senate amendments and passed on Final Reading House Bill 2503

(38-20-2); House Concurrent Resolution 2004 (38-20-2)

MOTION TO AUTHORIZE PRESIDENT PIERCE AND SPEAKER TOBIN LITIGATION

Senator Biggs made the following motion:

Whereas, even though the Senate believes it is clear under the Senate Rules, the Arizona Constitution, and case law, that the President of the Senate is authorized to represent the entire body in various matters, including litigation, but nevertheless the Arizona Supreme Court in Bennett v. Napolitano did not recognize this authority;

Therefore, I move that the Senate, Fiftieth Legislature, join with the House to file suit, and join or intervene in any suit in both state and federal court to defend the authority of the Senate related to redistricting under the Constitutions of both the United States and the State of Arizona. To accomplish this purpose the Senate authorizes the President to represent the interests of the Senate and take all appropriate action, including the retention of outside counsel, on its behalf in any matter related to redistricting, including acting jointly with the Speaker of the House to act on behalf of the Legislature as a whole.

Senator Schapira requested a roll call vote. Request for a roll call vote was supported by Senator Landrum Taylor. The motion passed by the following vote:

AYES 21: Allen, Antenori, Barto, Biggs, Burges, Crandall, Driggs, Gould, Gray, Griffin, Klein, Lewis, McComish, Melvin, Murphy, Nelson,

Reagan, Shooter, Smith, Yarbrough, President Pierce S

NOES 9: Aboud, Cajero Bedford, Gallardo, Jackson, Landrum Taylor, Lopez, Lujan, Meza, Schapira

THIRD READING OF BILLS

The following bill was read on Third Reading by number and title, passed on roll call and signed in open session:

House Bill 2571: An Act amending sections 3-107, 3-1003, 3-1003.02, 3-1211, 4-111, 4-112, 5-101.01, 5-105, 5-112, 5-224, 5-556, 5-604, 6-111, 6-112, 15-182, 15-203 and 15-543, ARS; repealing section 15-1331, ARS; amending sections 15-1626, 15-1852, 15-2002, 17-211, 17-231, 20-141, 20-148, 23-108, 23-108.02, 23-391, 23-406, 23-1501, 26-101, 26-102, 26-305, 27-122, 27-151, 28-363, 30-103, 30-108, 30-652, 31-401, 31-402, 32-106, 32-304, 32-503, 32-703, 32-802, 32-905, 32-1103, 32-1104, 32-1205, 32-1305, 32-1307, 32-1405, 32-1509, 32-1605.01, 32-1673, 32-1704, 32-1804, 32-1903, 32-1904, 32-2003, 32-2063, 32-2109, 32-2206, 32-2207, 32-2304, 32-2904, 32-2905, 32-3003, 32-3253, 32-3403, 32-3504, 32-3506, 32-3605, 32-3903, 32-3904, 35-196.01, 36-102, 36-103, 36-273, 36-446.03, 36-450.02, 36-1943, 36-2903.01, 36-2926, 37-132, 37-623.01, 37-1122, 38-401, 38-448, 38-532, 38-610.01, 38-610.02 and 38-611, ARS; amending title 38, chapter 4, article 1, ARS, by adding sections 38-611.01 and 38-611.02; amending sections 38-612, 38-654, 38-715, 38-848, 40-105, 40-108, 40-464, 41-121.02, 41-151.04, 41-151.05, 41-172, 41-192, 41-511.02, 41-511.05, 41-531, 41-542, 41-619.53 and 41-701, ARS; amending

title 41, chapter 4, article 1, ARS, by adding sections 41-709, 41-710 and 41-711; amending title 41, chapter 4, ARS, by adding article 4; repealing title 41, chapter 4, article 5, ARS; amending title 41, chapter 4, ARS, by adding a new article 5; changing the designation of title 41, chapter 4, article 6, ARS, to "state personnel board"; amending sections 41-781 and 41-782, ARS; repealing sections 41-783 and 41-784, ARS; transferring and renumbering section 41-785, ARS, for placement in title 41, chapter 4, article 6, as section 41-783; amending section 41-783, ARS, as transferred and renumbered by this act; repealing section 41-786, ARS; amending sections 41-821, 41-832, 41-902, 41-903, 41-941, 41-982, 41-1009, 41-1051, 41-1092.01, 41-1604, 41-1711, 41-1830.11, 41-1830.12 and 41-1830.13, ARS; repealing section 41-1830.14, ARS; amending section 41-1830.15, ARS; amending title 41, chapter 12, article 10, ARS, by adding section 41-1830.16; amending sections 41-1952, 41-1954, 41-2061, 41-2065, 41-2147, 41-2305, 41-2405, 41-2513, 41-2804, 41-2831, 41-3016.06, 41-3451, 41-3503, 41-3505, 41-3952, 41-4253, 41-4301, 41-4801, 42-1002, 42-1004, 42-1252, 42-16155, 45-104, 45-418, 49-103 and 49-1203, ARS; relating to the state personnel system.

AYES 21: Allen, Antenori, Barto, Biggs, Burges, Crandall, Driggs, Gould, Gray, Griffin, Klein, Lewis, McComish, Melvin, Murphy, Nelson, Reagan, Shooter, Smith, Yarbrough, President Pierce S

NOES 9: Aboud, Cajero Bedford, Gallardo, Jackson, Landrum Taylor, Lopez, Lujan, Meza, Schapira

ORDER OF BUSINESS

The President announced that without objection, the Senate would revert to the Order of Business, Committee of the Whole

COMMITTEE OF THE WHOLE

Upon motion of Senator Biggs and agreed to, the Senate at 2:33 p.m. resolved itself into Committee of the Whole for consideration of bills on the calendar with Senator Gray in the chair.

Senator Biggs moved that during Committee of the Whole the debate be limited to no more than three minutes per Senator, speaking once per motion. The motion carried.

At 2:55 p.m., the Committee of the Whole was dissolved and Senator Gray submitted the following recommendations:

House Bill 2745, do pass amended
House Concurrent Resolution 2060, do pass

Senator Gray moved the report of the Committee of the Whole be adopted and the bills be properly assigned. The motion carried and the bills reported do pass and do pass amended were placed under Third Reading of Bills.

CONFERENCE COMMITTEE REPORTS

Senator Biggs moved on behalf of the Chairman that the Senate adopt the following conference committee report:

Senators Biggs, McComish and Meza, Senate conferees, and Representatives Ugenti, Dial and

Tovar, House conferees, submitted the following conference report on Senate Bill 1153:

That the Senate accept the House amendments with exceptions and the bill be further amended.

The motion carried and the Secretary notified the House.

FINAL READING OF BILLS

The following bill was read on Final Reading by number and title, passed on roll call and signed in open session:

Senate Bill 1153: An Act amending section 28-2166, ARS; relating to vehicle rental liability.

AYES 29: Allen, Antenori, Barto, Biggs, Burges, Cajero Bedford, Crandall, Driggs, Gallardo, Gould, Gray, Griffin, Jackson, Klein, Landrum Taylor, Lewis, Lopez, Lujan, McComish, Melvin, Meza, Murphy, Nelson, Reagan, Schapira, Shooter, Smith, Yarbrough, President Pierce S

NOES 1: Aboud

RECESS

At 3:04 p.m. the Senate stood at recess subject to the sound of the gavel.

RECONVENE

The President called the Senate to order at 3:26 p.m.

THIRD READING OF BILLS

The following bill was read on Third Reading by number and title, passed on roll call and signed in open session:

House Bill 2745: An Act amending sections 38-711, 38-714, 38-715 and 38-718, ARS; repealing section 38-719, ARS; amending sections 38-721, 38-740, 38-743, 38-744, 38-745 and 38-760, ARS; providing for the delayed repeal of section 38-761, ARS; amending sections 38-762, 38-783, 38-797.07 and 38-843.05, ARS; making an appropriation; relating to retirement systems.

AYES 30: Aboud, Allen, Antenori, Barto, Biggs, Burges, Cajero Bedford, Crandall, Driggs, Gallardo, Gould, Gray, Griffin, Jackson, Klein, Landrum Taylor, Lewis, Lopez, Lujan, McComish, Melvin, Meza, Murphy, Nelson, Reagan, Schapira, Shooter, Smith, Yarbrough, President Pierce S

CONCURRENCE OF BILLS

Senator Biggs moved that the Senate concur in the House amendments to Senate Bill 1407. The motion carried.

The bill was placed under Final Reading of Bills.

FINAL READING OF BILLS

The following bill was read on Final Reading by number and title, passed on roll call and signed in open session:

Senate Bill 1407: An Act amending sections 48-261, 48-262, 48-266, 48-851 and 48-853 ARS; relating to fire districts.

AYES 29: Aboud, Allen, Antenori, Barto, Biggs, Burges, Cajero Bedford, Crandall, Driggs, Gallardo, Gray, Griffin, Jackson, Klein,

Landrum Taylor, Lewis, Lopez, Lujan, McComish, Melvin, Meza, Murphy, Nelson, Reagan, Schapira, Shooter, Smith, Yarbrough, President Pierce S

NOES 1: Gould

OTHER BUSINESS OF THE SENATE

EXECUTIVE CONFIRMATIONS

President Pierce announced that a group motion would be made for the confirmations unless a Senator requested a nomination to be considered separately.

The Committee on Commerce and Energy, Senator Melvin, Chairman, having had under consideration the matter of the Governor's appointment of Terry R. Gleeson as a member of the Board of Manufactured Housing for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Commerce and Energy, Senator Melvin, Chairman, having had under consideration the matter of the Governor's appointment of Sharon L. Henry as a member of the Arizona Sports and Tourism Authority for the term of office expiring July 1, 2014 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Commerce and Energy, Senator Melvin, Chairman, having had under consideration the matter of the Governor's appointment of Zeek Ojeh as a member of the Board of Manufactured Housing for the term of office expiring January 19, 2015 submitted

the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Commerce and Energy, Senator Melvin, Chairman, having had under consideration the matter of the Governor's appointment of Nicholas P. Scutari as a member of the Arizona State Lottery Commission for the term of office expiring January 16, 2017 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Eldon E. Hastings as a member of the Commission for Postsecondary Education for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Todd A. Juhl as a member of the State Board for Charter Schools for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Patricia J. Leonard as a member of the State Board for Private Postsecondary Education for the term of office expiring January 15, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Jason D. Pistillo as a member of the State Board for Private Postsecondary Education for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Kathleen Player as a member of the Commission for Postsecondary Education for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Kathryn L. Senseman as a member of the State Board for Charter Schools for the term of office expiring January 20, 2014 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Jeffrey J. Smith as a member of the School Facilities Board for the term of office expiring January 18, 2016 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter

of the Governor's appointment of Thomas J. Connelly as a member of the Arizona State Retirement System Board for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of William C. Davis as a member of the Public Safety Personnel Retirement System Board of Trustees for the term of office expiring January 16, 2017 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of Derrick R.E. Doba as a member of the State Board of Tax Appeals for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of Gregory S. Ferguson as a member of the Public Safety Personnel Retirement System Board of Trustees for the term of office expiring January 16, 2017 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of Steven R. Matthews as a member of the Family College Savings Program

Oversight Committee for the term of office expiring January 18, 2016 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of Michael J. Smarik as a member of the Arizona State Retirement System Board for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Government Reform, Senator Murphy, Chairman, having had under consideration the matter of the Governor's appointment of Patrick J. Quinn as a member of the State Personnel Board for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Government Reform, Senator Murphy, Chairman, having had under consideration the matter of the Governor's appointment of James V. Thompson as a member of the State Personnel Board for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Healthcare and Medical Liability Reform, Senator Barto, Chairman, having had under

consideration the matter of the Governor's appointment of James M. Gillard as a member of the Arizona Medical Board for the term of office expiring July 1, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Healthcare and Medical Liability Reform, Senator Barto, Chairman, having had under consideration the matter of the Governor's appointment of Harold Magalnick as a member of the Arizona Medical Board for the term of office expiring July 1, 2012 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Judiciary, Senator Gould, Chairman, having had under consideration the matter of the Governor's appointment of Charles A. Brown III as a member of the Commission on Trial Court Appointments, Maricopa County for the term of office expiring January 20, 2014 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Judiciary, Senator Gould, Chairman, having had under consideration the matter of the Governor's appointment of Nicholas Basil Simonetta as a member of the Urban Land Planning Oversight Committee for the term of office expiring January 18, 2016 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of James V. Christensen as a member of the Arizona State Veterinary Medical Examining Board for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of Janet Kay Daggett as a member of the Arizona State Parks Board for the term of office expiring January 15, 2018 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of Rory S. Goree as a member of the Arizona Racing Commission for the term of office expiring January 16, 2017 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of Donald R. Johnson as a member of the Arizona Game and Fish Commission Appointment Recommendation Board for the term of office expiring July 29, 2014 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of Joseph E. La Rue as a member of the State Transportation Board for the term of office expiring January 15, 2018 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Veterans, Military and Government Affairs, Senator Driggs, Chairman, having had under consideration the matter of the Governor's appointment of Richard A. Kochanski as a member of the State Fire Safety Committee for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Veterans, Military and Government Affairs, Senator Driggs, Chairman, having had under consideration the matter of the Governor's appointment of Russell H. Louman as a member of the State Fire Safety Committee for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Veterans, Military and Government Affairs, Senator Driggs, Chairman, having had under consideration the matter of the Governor's appointment of Patrick N. Moore as a member of the State Fire Safety Committee for the term of office expiring January 20, 2014 submitted the following report: Your

Committee recommends to the Senate the confirmation.

The Committee on Veterans, Military and Government Affairs, Senator Driggs, Chairman, having had under consideration the matter of the Governor's appointment of Rick Alan Southey as a member of the State Fire Safety Committee for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Secretary notified the Governor and the Secretary of State of the confirmations.

CONFERENCE COMMITTEE REPORTS

Senator Biggs moved on behalf of the Chairman that the Senate adopt the following conference committee report:

> Senators Gray, Lopez and Yarbrough, Senate conferees, and Representatives Harper, Meyer and Yee, House conferees, submitted the following corrected conference report on House Bill 2093:
>
> That the House accept the Senate amendments with exceptions and the bill be further amended.

The motion carried and the Secretary recorded the action and notified the House.

RECESS

At 3:48 p.m. the Senate stood at recess subject to the sound of the gavel.

RECONVENE

President Pro Tempore Allen assumed the chair and called the Senate to order at 4:46 p.m.

ADJOURNMENT

Upon motion of Senator Biggs and agreed to, the Senate adjourned at 4:46 p.m. until Thursday, May 3, 2012 at 10:00 a.m.

SYLVIA ALLEN
President Pro Tempore of the Senate

ATTEST:

CHARMION BILLINGTON
Secretary of the Senate

JOURNAL OF THE HOUSE

Wednesday, May 2, 2012

One Hundred Fifteenth Day

The session scheduled to convene at 10:00 a.m. was called to order at 10:40 a.m., Speaker Andrew M. Tobin presiding.

Attendance roll call was as follows:

PRESENT: Alston, Arredondo, Ash, Barton, Campbell, Chabin, Court, Crandell, Dial, Fann, Farley, Farnsworth, Fillmore, Fontana, Forese, Gallego, Gonzales, Goodale, Gowan, Gray R, Hale, Harper,

Heinz, Hobbs, Jones, Judd, Kavanagh, Lesko, Lovas, McLain, Meyer, Miranda C, Montenegro, Olson, Pancrazi, Pierce, Pratt, Quezada, Reeve, Robson, Saldate, Seel, Smith D, Stevens, Tovar, Urie, Vogt, Weiers Jerry P, Wheeler, Williams, Yee, Speaker Tobin–52

ABSENT: Mesnard, Ugenti, Weiers Jim–3

EXCUSED: Ableser, Brophy McGee, Carter, McCune Davis, Proud–5

Members Ableser, Brophy McGee, Carter, McCune Davis and Proud were excused on personal business.

Members McCune Davis and Mesnard were seated at 11:15 a.m. Mrs. Ugenti was seated at 11:19 a.m. Mr. Jim Weiers was seated at 11:48 a.m. Mrs. Carter was seated at 11:50 a.m. Mrs. Brophy McGee was seated at 11:51 a.m.

Prayer was offered by Member Tom Forese.

The Pledge of Allegiance to the Flag was led by Member John Fillmore.

Without objection the reading of the Journal of Tuesday, May 1S, 2012, was dispensed with and approved as written.

PERSONAL PRIVILEGE

Mrs. Yee expressed appreciation to staff, members and leadership of the House.

REPORTS OF SELECT COMMITTEES

The Free Conference Committee on Senate Bill 1153 reported:

That the Senate accept the House amendments with exceptions and the bill be further amended.

HOUSE CONFEREES:	SENATE CONFEREES:
Michelle Ugenti	Andy Biggs
Jeff Dial	John McComish
Anna Tovay	Robert Meza

Motion by Mr. Court that the House adopt the Conference Committee Report on Senate Bill 1153. Carried.

BUSINESS ON THE SPEAKER'S DESK

Certificates of appreciation were presented to the following House pages:

Daniel Briggin	Kyle Briggin	Tara Chapman
Carissa Cortez	Rose Estes	Daniel Frank
Samantha Franklin	William Fry	Anadela Hogan
Bethany Hunter	Frank (Taylor) Larson	Esther Linkey
Adrian Luth	Brendan Melander	Megan O'Brien
Micah Palich	Devon Romo	Ben Scheel

Jessica Sornsin	Charissa Wright

Certificates of appreciation were presented to the following House interns:

Christopher Adams	Alexis Burkhart	Virginia Carico
Patrick Devine	Thomas Drogaris	Yijee Jeong
Bethan Jones	Tom Kwon	Traci Long
Stuart Luther	Kate Sommerville	
Chelsea Rubin	Casaundra Wallace	Katherine Adler
Elizabeth Bixby	Daniel Dominguez	Brian Holly
Lourdes Pena	Kimberley Pope	Tameka Spence
Nathan Wade	Krystle Fernandez	Paul Gales
Ryan McCarthy	Kyle LaRose	

UNFINISHED BUSINESS

Motion by Mr. Mesnard that the House accede to the Senate request and appoint a Free Conference Committee to consider the disagreement on House

amendments to Senate Bill 1442. Carried, and Speaker Tobin appointed Members Mesnard, Farley and Vogt

Motion by Mr. Harper that the House accede to the Senate request and appoint a Free Conference Committee to consider the disagreement on House amendments to Senate Bill 1449. Carried, and Speaker Tobin appointed Members Montenegro, Farnsworth and Quezada

BUSINESS ON THE SPEAKER'S DESK

Motion by Mr. Farnsworth that , whereas, even though the House of Representatives believes it is clear under the House Rules, the Arizona Constitution, and case law, that the Speaker of the House of Representatives is authorized to represent the entire body in various matters, including litigation, but nevertheless the Arizona Supreme Court in Bennett v. Napolitano did not recognize this authority; therefore, I move that the House of Representatives, Fiftieth Legislature, join with the Senate to file suit, and join or intervene in any suit in both state and federal court to defend the authority of the House related to redistricting under the Constitutions of both the United States and of the State of Arizona. To accomplish this purpose the House authorizes the Speaker to represent the interests of the House of Representatives and take all appropriate action, including the retention of outside counsel, on its behalf in any matter related to redistricting, including acting jointly with the Senate President to act on behalf of the Legislature as a whole. Carried.

Speaker Tobin announced pursuant to House Rule 17E, that permission was granted for conference committees to meet through today, May 2, 2012.

THIRD READING OF BILLS

The following bills were read the third time by number and title, passed on roll call vote and signed in open session by Speaker Tobin:

Senate Bill 1407: An Act amending sections 48-261, 48-262, 48-266, 48-851 and 48-853 ARS; relating to fire districts.

AYES 58: Alston, Arredondo, Ash, Barton, Brophy Mcgee, Campbell, Carter, Chabin, Court, Crandell, Dial, Fann, Farley, Farnsworth, Fillmore, Fontana, Forese, Gallego, Gonzales, Goodale, Gowan, Gray R, Hale, Harper, Heinz, Hobbs, Jones, Judd, Kavanagh, Lesko, Lovas, McCune Davis, McLain, Mesnard, Meyer, Miranda C, Montenegro, Olson, Pancrazi, Pierce, Pratt, Quezada, Reeve, Robson, Saldate, Seel, Smith D, Stevens, Tovar, Ugenti, Urie, Vogt, Weiers J, Weiers Jp, Wheeler, Williams, Yee, Speaker Tobin

NOT VOTING 2: Ableser, Proud

UNFINISHED BUSINESS

Motion by Mrs. Yee that the House concur in the Senate amendments to House Bill 2503. Carried.

FINAL PASSAGE

The following bill, as amended by the Senate, was read the final time by number and title, passed on roll call vote and signed in open session by Speaker Tobin:

House Bill 2503: An Act amending title 12, chapter 6, article 9, ARS, by adding section 12-689; relating to product liability.

AYES 38: Barton, Brophy McGee, Carter, Chabin, Court, Crandell, Dial, Fann, Farnsworth, Fillmore, Forese, Goodale, Gowan, Gray R, Harper, Jones, Judd, Kavanagh, Lesko, Lovas, McLain, Mesnard, Montenegro, Olson, Pierce, Pratt, Reeve, Robson, Seel, Stevens, Ugenti, Urie, Vogt, Weiers J, Weiers Jp, Williams, Yee, Speaker Tobin

NAYS 20: Alston, Arredondo, Ash, Campbell, Farley, Fontana, Gallego, Gonzales, Hale, Heinz, Hobbs, McCune Davis, Meyer, Miranda C, Pancrazi, Quezada, Saldate, Smith D, Tovar, Wheeler

NOT VOTING 2: Ableser, Proud

UNFINISHED BUSINESS

Motion by Mr. Crandell that the House concur in the Senate amendments to House Concurrent Resolution 2004. Carried.

FINAL PASSAGE

The following bill, as amended by the Senate, was read the final time by number and title, passed on roll call vote and signed in open session by Speaker Tobin:

House Concurrent Resolution 2004: A Concurrent Resolution proposing an amendment to the Constitution of Arizona; amending the Constitution of Arizona by adding article II.I; amending article XX,

paragraphs 4 and 12, Constitution of Arizona; relating to state sovereignty.

AYES 38: Ash, Barton, Brophy Mcgee, Carter, Court, Crandell, Dial, Fann, Farnsworth, Fillmore, Forese, Goodale, Gowan, Gray R, Harper, Jones, Judd, Kavanagh, Lesko, Lovas, McLain, Mesnard, Montenegro, Olson, Pierce, Pratt, Robson, Seel, Smith D, Stevens, Ugenti, Urie, Vogt, Weiers J, Weiers Jp, Williams, Yee, Speaker Tobin

NAYS 20: Alston, Arredondo, Campbell, Chabin, Farley, Fontana, Gallego, Gonzales, Hale, Heinz, Hobbs, McCune Davis, Meyer, Miranda C, Pancrazi, Quezada, Reeve, Saldate, Tovar, Wheeler

NOT VOTING 2: Ableser, Proud

Motion by Mr. Court that the House stand at recess subject to the sound of the gavel. Carried at 12:45 p.m.

Speaker Tobin called the House to order at 3:54 p.m.

BILLS AND OTHER BUSINESS FROM THE SENATE

HB 2571, passed amended, 21-9-0
SB 1153, passed on Final Passage, 29-1-0

Motion by Mr. Court that the House stand adjourned until 10:00 a.m., Thursday, May 3, 2012. Carried at 3:55 p.m.

ANDREW M. TOBIN
Speaker of the House

ATTEST:

CHERYL LAUBE
Chief Clerk of the House

MOTION

No. 13-1314

In The
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT
REDISTRICTING COMMISSION, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Arizona

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

The Elections Clause, Article I, § 4 of the Constitution, states that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." This Court has held that this clause does not give "power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley v. Holm*, 285 U.S. 355, 368 (1932). Since voters amended the law in 2000, Arizona's Constitution has required an Independent Redistricting Commission to adopt the State's congressional redistricting plans rather than the Legislature.

The question presented is whether the three-judge district court correctly rejected Appellant's claim that Arizona's use of a commission to adopt congressional districts violates Article I, § 4 of the United States Constitution.

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JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253, except insofar as the Court lacks jurisdiction because this case presents a non-justiciable political question (*see* § III, *infra*).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

In addition to those set forth in Appellant's jurisdictional statement, the Commission refers to the following constitutional and statutory provisions.

2 U.S.C. § 2a governs various aspects of reapportionment and the manner of electing members of the House of Representatives. Section 2a(c) states, "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in [one of five manners, depending on the circumstances]."

Article IV, Part 1, § 1(1) of the Arizona Constitution states:

> The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option,

> the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

Article IV, Part 1, § 1(15) of the Arizona Constitution states, "Nothing in this section shall be construed to deprive or limit the legislature of the right to order the submission to the people at the polls of any measure, item, section, or part of any measure."

MOTION TO DISMISS OR AFFIRM

ARGUMENT

As in many other states, the Arizona Legislature shares legislative power with the people, who since statehood have had the power to pass laws or amend the state constitution through ballot measures. Ariz. Const. art. IV, pt. 1, § 1(1). In 2000, Arizonans used that power to create a new constitutional body, the Independent Redistricting Commission, whose purpose is to "provide for the redistricting of congressional and state legislative districts." Ariz. Const. art. IV, pt. 2, § 1(3)-(23) ("Prop 106"). Until then, the Legislature had controlled redistricting legislation, subject to the governor's veto and the people's power of referendum and initiative.

Apparently dissatisfied with the Commission's congressional redistricting plan adopted in 2012, the Legislature brought this case on the theory that the voter-created Commission violates Article I's Elections Clause because it "divests the Legislature of its

authority" over redistricting legislation. (*See* Appellant's Jurisdictional Statement ("JS") at 33.) *See* U.S. Const. art. I, § 4.

This Court should dismiss this appeal for lack of a substantial federal question or summarily affirm the district court's dismissal of the Legislature's claim. The three-judge panel's order is a straightforward application of this Court's long-standing precedent. In two cases, this Court has already rejected the argument that the Elections Clause grants a state legislature some special institutional control over redistricting legislation. *Smiley v. Holm*, 285 U.S. 355 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

The Elections Clause gives states the authority to regulate federal elections by enacting legislation in the manner "in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 368. In Arizona, the state constitution "has provided that" redistricting legislation "shall be enacted" through the Commission. Like the voter referendum in *Hildebrant* and the gubernatorial veto in *Smiley*, the existence of the Commission "is a matter of state polity" that does not violate the Elections Clause. *Smiley*, 285 U.S. at 368. The Court need not take plenary review merely to consider another factual permutation of an issue it resolved long ago.

In the alternative, although the district court decided the merits, this Court should vacate the district court's judgment and remand with instructions

to dismiss for lack of subject matter jurisdiction. The case presents a non-justiciable political question because the Constitution dedicates this question to Congress, which has power to "make or alter" state regulations. And Congress decided a century ago that redistricting should be done pursuant to state law. *See* 2 U.S.C. § 2a(c).

I. The Legislature's Appeal Fails to Raise a Substantial Question Because the District Court's Judgment Is Fully Consistent with Existing Law.

The Legislature's arguments below and on appeal interpret the Elections Clause's use of the words "by the Legislature thereof" to mean that a state legislature, as a body, must have control – an "outcome-defining" role – over congressional redistricting, even if the state's constitution organizes legislative power differently. (*See*, *e.g.*, JS at 19.) But the Legislature's interpretation has long been rejected. Moreover, the Legislature argues for a constitutional rule at odds with the important federalism principle that redistricting is "primarily the duty and responsibility of the State." *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (internal quotation marks and citation omitted). There is no conflict among courts on the issue presented in this appeal, no good reason to change the settled view of the Elections Clause, and therefore no substantial question that warrants this Court's review.

A. Controlling Supreme Court Law Is Clear: The Elections Clause Is a Delegation of Legislative Power to the States, Not a Directive as to How a State Ought to Organize Its Legislative Process.

The district court relied primarily on *Hildebrant* and *Smiley*. Taken together, as the district court put it, these cases establish that "the word 'Legislature' in the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws." (JS App. 15.)

In *Hildebrant*, the Court considered whether the Elections Clause permitted an Ohio voter referendum to void a redistricting plan the Ohio legislature had passed. 241 U.S. at 566-67. Ohio, like many states in the early twentieth century, had recently amended the state's constitution to vest "legislative power . . . not only in the senate and house of representatives of the state . . . but in the people." *Id.* at 566. The constitution reserved for the people a referendum power through which voters could approve or disapprove of any law the legislature passed, a power the voters used to disapprove of a congressional redistricting plan. *Id.* at 566-67. The Ohio constitution would have voided the legislation as a result of the referendum's approval but a mandamus action contended that the referendum vote could not be part of the state's legislative authority without violating the Elections Clause. *Id.* at 567.

The Court first explained that both state law and federal statute permitted the use of the referendum in redistricting. The referendum was "part of the state Constitution and laws, and was contained within the legislative power" of Ohio. *Id.* at 568. Furthermore, as further discussed below (§ III), Congress had amended its apportionment statute specifically to permit the use of ballot measures in congressional redistricting, so there could be no claim that the state referendum was prohibited through Congress's power to "make or alter" elections laws. *Id.* at 568-69 (discussing 1911 amendment to statute that changed language to require that redistricting should be done "in the manner provided by the laws" rather than by "the legislature" of each state). Thus, the only remaining argument was that state and federal law violated the Elections Clause itself by impermissibly "includ[ing] the referendum within state legislative power for the purpose of apportionment." *Id.* at 569.

The Court held that this argument "is plainly without substance." *Id.* It saw that the argument relied on two contentions, both of which failed. They were (1) that Congress could not constitutionally approve of "treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitution and laws;" or (2) the inclusion of the referendum in a state's legislative power is "obnoxious to a republican form of government as provided in" the republican guaranty clause. *Id.* at 569-70. In either case, the Constitution authorized Congress to decide the question. *Id.* (citing

Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912)).

As the district court recognized below, a necessary premise of *Hildebrant* is that the Elections Clause, by its terms, does not delegate power solely to the "legislature" as a body. Instead, the Elections Clause delegates authority to the "state's legislative power," subject to Congress's approval. (*See* JS App. 12-13.)

The Court confirmed this reading of the Elections Clause in *Smiley v. Holm*. There, after Minnesota's governor vetoed the legislature's congressional redistricting bill, the legislature nevertheless forwarded the bill to the secretary of state for use in the next election. 285 U.S. at 361. The secretary of state rejected claims that the bill was a "nullity" because of the veto, insisting that it was valid "by virtue of the authority conferred upon the Legislature by" the Elections Clause. *Id.* at 362-63.

As it did in *Hildebrant*, the Court rejected the idea that the Elections Clause vests a state legislature as a body with a "particular authority" that would "render[ ] inapplicable the conditions which attach to the making of state laws." *Smiley*, 285 U.S. at 365. Focusing the issue, the Court explained that the definition of the word "legislature" was not a mystery – it means "the representative body which made the laws of the people" – but that did not answer the constitutional question. *Id.* "The question

. . . is not with respect to the 'body' . . . but as to the function to be performed." *Id.*

After examining the clause and its purpose, the Court held that the Elections Clause conferred "authority . . . for the purpose of making laws for the state" and thus "the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367. The Court found "no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 368. The Court also saw Congress's 1911 amendment, which rewrote the apportionment statute to require that redistricting be done "in the manner provided by the laws" of each state, as additional evidence of "the nature of the authority deemed to have been conferred by the constitutional provision." *Id.* at 372.

Ultimately, both *Hildebrant* and *Smiley* held that the Elections Clause confers an authority to enact legislation concerning federal elections, not an edict as to how the state must go about enacting the legislation. In *Hildebrant*, the Court upheld the validity of the referendum "because of the authority of the state to determine what should constitute its legislative process." *Smiley*, 285 U.S. at 372. Likewise, the existence of a gubernatorial veto in *Smiley* was a "matter of state polity" that the Elections Clause "neither requires nor excludes." *Id.* at 368.

These cases thus stand for the principle the district court articulated and that this Court should summarily affirm: "the word 'Legislature' in the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws." (JS App. 15.)

B. Arizona's Redistricting Process Is Consistent with Current Law.

1. The Arizona Independent Redistricting Commission Is a Component of Arizona's Constitutional Legislative Process and Its Redistricting Plans Are a Product of the Legislative Power of the State.

Arizona's method for enacting congressional districts is fully consistent with *Hildebrant*, *Smiley*, and the settled understanding of the Elections Clause. The relevant inquiry is not (as the Legislature assumes) how much power over the process the Legislature has. Rather, the question is whether legislation falling under the ambit of the Elections Clause is enacted "in accordance with the method which the state has prescribed." *Smiley*, 285 U.S. at 367.

The Legislature incorrectly asserts that Prop 106 "operates ***outside*** Arizona's legislative process." (JS at 16.) The Arizona Supreme Court held that the "Commission acts as a legislative body," not merely an "administrative body." *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*,

208 P.3d 676, 683-84 (Ariz. 2009). The Commission's redistricting plans have "the hallmarks of traditional legislation" and Arizona courts treat the Commission's redistricting plans with "the same deference . . . afford[ed] to other legislation." *Id.* at 684 (internal quotation marks and citation omitted).

Furthermore, the Legislature has never been the sole repository of Arizona's legislative power. Since statehood, the Arizona Constitution has reserved for the "people" the power to "propose laws and amendments to the constitution" by initiative and referendum. Ariz. Const. art. IV, pt. 1, § 1(1); art. XXI § 1; art. XXII, § 14; *see also Cave Creek Unified Sch. Dist. v. Ducey*, 308 P.3d 1152, 1155 (Ariz. 2013) ("The legislature and electorate share lawmaking power under Arizona's system of government." (internal quotation marks and citation omitted)). With Prop 106, voters amended the Arizona Constitution to create the Commission, a constitutional body that is part of Article IV of the constitution, which governs the "Legislative Department."

Finally, as discussed below (§ III), the Legislature's argument reduces to a contention that the Commission is not sufficiently "legislative" to wield lawmaking power under the Elections Clause. That is precisely the kind of argument that *Hildebrant* held is a non-justiciable political question reserved for Congress. 241 U.S. at 569.

Like the referendum in *Hildebrant* and the veto in *Smiley*, the Independent Redistricting Commission

is a "part of the state Constitution and laws, and [is] contained within the legislative power" of Arizona. *Hildebrant*, 241 U.S. at 568. Arizona's use of the Commission as part of its lawmaking power is thus fully consistent with the Elections Clause.

2. Even Under the Legislature's Incorrect Interpretation, Arizona Does Not "Exclude" the Legislature.

The Legislature asks the Court to hold that Prop 106 violates the Elections Clause because Prop 106 "fully remove[s]" the Legislature's authority over redistricting. (JS at 33.) The Legislature overstates its case. Arizona does not fully "remove" or "divest" the Legislature's authority over redistricting. The Court need not take plenary review to consider this issue because the Legislature's claim fails even under its own flawed interpretation.

Prop 106 shifts power over redistricting legislation from the Legislature to the Commission. But the Legislature retains the power to pass a redistricting plan and refer it to the voters for approval. Ariz. Const. art. IV, pt. 1, § 1(15) ("Nothing in this section . . . deprive[s] or limit[s] the legislature of the right to order the submission to the people . . . of any measure, item, section, or part of any measure."); *id.* art. XXI, § 1 ("Any amendment . . . to this constitution may be proposed in either house of the legislature," and when approved by "a majority of the members . . . the

secretary of state shall submit such proposed amendment . . . to the vote of the people. . . .").

This structure (unaltered in Prop 106) is functionally no more of an "exclusion" of the Legislature than what the Court approved of in *Hildebrant* and *Smiley*. In both cases, the legislature's preference was wholly rejected and nullified by way of referendum vote and veto. The Elections Clause did not save the legislature from having to obtain gubernatorial approval in *Smiley* or voter approval in *Hildebrant*. The situation here is hardly different. The Arizona Constitution allows the Legislature to create a redistricting plan and seek voter approval of it. This Court should not take plenary review of what is merely another permutation of *Hildebrant* and *Smiley*.

C. There Is No Conflict Among Lower Courts; All Agree That the Elections Clause Delegates a Power to Legislate in the Manner State Law Requires.

Summary affirmance is also proper because the district court's decision is consistent with other lower court decisions confronting this issue. In its Jurisdictional Statement, the Legislature cites cases that confirm the general principle set forth above: the delegation in the Elections Clause is to a legislative process, not a particular body. (JS at 8.) There is no conflict among federal courts on this point.

The most recent decision is *Brown v. Secretary of State of Florida*, 668 F.3d 1271 (11th Cir. 2012).

There, Florida voters approved a ballot initiative which limited the legislature's discretion over redistricting, requiring the legislature to consider certain questions as part of the process. Plaintiffs contended that the initiative violated the Elections Clause because it was not passed through the legislature itself which "would effectively read the 'Legislature' out of the Elections Clause." *Id.* at 1275. The Eleventh Circuit easily rejected the argument, explaining that *Smiley* and *Hildebrant* "provided a clear and unambiguous answer . . . twice explaining that the term 'Legislature' . . . refers not just to a state's legislative body but more broadly to the entire lawmaking process of the state." *Id.* at 1276-77.

Another related federal decision is *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003). There, the three-judge district court held that the Elections Clause would prohibit the implementation of a court-created redistricting plan. *Smith*, 189 F. Supp. 2d at 550. Like *Brown*, the court explained that *Smiley* and *Hildebrant* "have made clear that the reference to 'Legislature' in Article I, Section 4 is to the lawmaking body and processes of the state." *Id.* at 553. Thus, "congressional redistricting must be done within the perimeters of the legislative processes, whether the redistricting is done by the legislature itself or pursuant to the valid delegation of legislative power." *Id.* at 554. The court-created plan failed this standard because nothing in the state's constitution or statutes delegated any legislative authority to the

court to establish a congressional redistricting plan. *Id.* at 558; *see also Grills v. Branigin*, 284 F. Supp. 176, 180 (S.D. Ind. 1968) (explaining that Elections Clause does not authorize Election Board of Indiana "to create congressional districts" because "the Election Board does not possess the legislative power under the Indiana Constitution").

A survey of federal cases confirms that there is no need for this Court to take plenary review of this issue. Courts construing the Elections Clause uniformly interpret it to mean that state-made laws regulating the time, place, and manner of federal elections must be enacted pursuant to the legislative power as the state itself defines it.

D. The Legislature's Arguments That the District Court's Decision Is Inconsistent with Existing Law Amount to Nothing More Than a Disagreement with the Law, Not Substantial Questions Needing This Court's Attention.

The Legislature contends that the district court's decision conflicts with *Smiley* and *Hildebrant*. The Legislature's arguments concentrate on defining some constitutional line that the people of Arizona crossed when they voted to diminish the Legislature's power over congressional redistricting. But *Smiley* and *Hildebrant* already resolved what the line is: the lawmaking authority must be exercised consistent with the state's constitution and laws, and Congress's preemption power. The Legislature's anxiety about a

loss of power is unsurprising, but its arguments do not present substantial questions in need of plenary review.

1. The Legislature Badly Distorts *Smiley* and Ignores *Hildebrant*.

The Legislature's primary argument is that the district court's order "departs from the central holding of *Smiley*." (JS at 14-17.) According to the Legislature, the "central holding" is that the Elections Clause "does not prohibit limitations on a state legislature[ ]," such as a veto, but the legislature itself must be doing the lawmaking. (JS at 14.) The Legislature badly distorts *Smiley* in constructing this constitutional rule.

The Legislature draws this "central holding" primarily from a single passage in *Smiley*: "What [Legislature] meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." *Smiley*, 285 U.S. at 365 (internal quotation marks and citation omitted). But the Legislature ignores the surrounding sentences to pluck this sentence out for special, unwarranted meaning. The Court explained that the meaning of the word Legislature "is beside the point" because "[t]he question here is not with respect to the 'body' as thus described but as to the function to be performed." *Id.*

Smiley's actual holding is quite different than the Legislature suggests. If the "function" delegated is

lawmaking on topics within the Elections Clause, then the Elections Clause does not alter the state's lawmaking process itself. Or, as the Court put it in *Smiley*: "As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367.

Furthermore, in hyper-focusing on a single passage in *Smiley*, the Legislature entirely ignores *Hildebrant*. But *Hildebrant* is significant. In *Hildebrant*, the Court was asked to declare that the Elections Clause prohibited the state of Ohio from shifting legislative power over redistricting from the legislature to the people, who could wholly void the legislature's preference through a referendum. The Court refused, finding that the argument was "plainly without substance." 241 U.S. at 569.

The Legislature says essentially nothing about *Hildebrant* but the case is fatal to the Legislature's claim.

2. The Argument That the Legislature Has No "Meaningful Role" in Redistricting Is Irrelevant.

Having misread *Smiley* to permit no more than "checks" on the Legislature's control over redistricting and other topics within the scope of the Elections Clause, the Legislature next argues that Prop 106

violates this rule because the Legislature "has no meaningful role" in redistricting or because Prop 106 impermissibly "divested" the Legislature of authority over redistricting. (JS at 17.)

This argument fails to present a substantial question for the same reasons previously explained. The Legislature's contention that it must have some minimum level of "influence" (JS at 18) or "meaningful role" simply ignores that the Court in *Smiley* found "no suggestion in the federal constitution provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided." 285 U.S. at 367-68.

Prop 106 sets forth the "manner" of redistricting that "the Constitution of the state has provided." The Legislature measures Prop 106 against a constitutional standard that does not exist. Especially given that no courts have so misread *Smiley* or *Hildebrant*, the Legislature's arguments do not raise any substantial question for plenary review.

II. The Legislature's Arguments Regarding the Text and History of the Elections Clause Fail to Raise a Substantial Question for Review.

The Legislature also argues that, regardless of controlling precedent, the Elections Clause's text, "context and history" show that states cannot shift their legislative power over redistricting away from

the Legislature. (JS at 23-33.) These arguments fail to raise a substantial question for review.

A. The Legislature's "Context" Argument Was Already Considered and Rejected in *Smiley*.

The Legislature contends that the use of the word "Legislature" must have been a deliberate limitation on state authority because the Constitution "frequently acknowledge[s] and refer[s] to 'the states'" but "[l]ess frequently . . . specifically references local agencies of government." (JS at 24.) This is not a new argument and it does not add to the Legislature's case for plenary review.

In *Smiley*, the Court held that the fact that the "Legislature" was delegated a specific authority in other constitutional provisions (e.g., to ratify constitutional amendments) did not change the nature of the power delegated under the Elections Clause. 285 U.S. at 365-66. The determinative question was the "function" being delegated, and the Elections Clause delegated the lawmaking power on certain subjects. *Id.* at 366. The mere use of the word "Legislature" does not mean that the Elections Clause "invests the Legislature with a particular authority" that would "render[ ] inapplicable the conditions which attach to the making of state laws." *Id.* at 365.

The Legislature's citation to *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), and

McPherson v. Blacker, 146 U.S. 1 (1892), is not relevant to this analysis.

Both cases concern the state's authority to appoint presidential electors under Article II, not the Article I Elections Clause. *See* U.S. Const. art. II, § 1, cl. 2. For example, the Legislature refers to a passage in *Bush v. Palm Beach County*, in which the Court implies that Florida's legislative enactments regarding presidential electors should not be subject to the strictures of Florida's constitution. 531 U.S. at 77 (faulting state court for assuming that state legislation regarding electors must be consistent with the state constitution). *Bush* does not reference the Elections Clause or *Smiley*. Whatever may be said of other constitutional provisions, the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 368.

Furthermore, despite the Legislature's description, *McPherson v. Blacker* does not "[strike] down a state constitutional provision limiting the ability of the Michigan Legislature to appoint presidential electors." (JS at 24-25.) No such claim or argument appears in the case. In *McPherson*, the Court upheld a Michigan law requiring the appointment of presidential electors by way of a vote "in each of [Michigan's] twelve congressional districts" rather than a statewide at-large election. 146 U.S. at 24-25; *see also id.* at 42 ("[T]he act of the legislature of Michigan

. . . is not void as in contravention of the constitution of the United States. . . .").

Having mischaracterized the case, the Legislature then poaches a phrase from *McPherson* indicating that a delegation of power to "the Legislature" is a "limitation upon the state in respect of any attempt to circumscribe the legislative power." (JS at 25 (quoting *McPherson*, 146 U.S. at 25).) The Legislature does not explain how this out-of-context dicta supports its theory that the Elections Clause prohibits Arizona from reorganizing its legislative power. What is clear is that *McPherson* simply does not deal with the issues presented here.

The Legislature has not advanced any argument that the Court did not already dispose of in *Smiley*. Accordingly, the Legislature's argument does not raise a substantial question for review.

B. The Legislature's Interpretation of the Elections Clause Is Implausible.

The Legislature's interpretation is implausible and harmful to state sovereignty.

First, the Legislature argues that the Elections Clause requires the Legislature's lawmaking authority to trump the lawmaking authority of the voters who approved Prop 106, never mind what Arizona's constitution says. This argument ignores that the initiative and referendum process did not exist in the states in the late 18th Century. Arizona's division of legislative

power between an elected legislature and the people directly was part of a movement gaining speed at the turn of the 20th Century. *See, e.g.*, Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11, 16 (1997) (showing chronology of adoption of initiative and referendum beginning in 1898); *see also* 47 Cong. Rec. 3436 (1911) (statement by Senator Burton that by 1911 the initiative and referendum were already in "existence . . . in divers[e] States of the Union" as "recognized methods of enacting laws").

The idea that the Framers intended for the words "Legislature thereof" in the Elections Clause to exclude a method of legislating that did not exist in the states at the time but is now commonplace makes little sense. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (stating that "[w]e do not interpret constitutional rights" to exclude alternative forms just because they "were not in existence at the time of the founding").

Second, the Legislature's position conflicts with federalism principles that were critically important during the ratification of the Elections Clause and continue to feature prominently in this Court's redistricting and Elections Clause decisions.

"The Elections Clause has two functions. Upon the States it imposes the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether."

Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253 (2013). The Legislature would have this Court write into the clause an invasive limitation on how states may pass laws regarding elections. The text and historical evidence do not support such an intrusive view of the Elections Clause. If anything, the Legislature's reading of the clause is implausible in light of the historical record.

The clause "proved to be one of the most controversial provisions in the new Constitution." Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 23 (2010). But the "[d]ebate about the Elections Clause . . . focused almost exclusively on the Clause's second part, which allows Congress to" override state law. *Brown*, 668 F.3d at 1275. Anti-federalists feared that Congress would exploit the preemption power to override local concerns. Natelson, *supra*, at 25-32 (summarizing controversy and fears of expansive congressional power over elections). Ultimately, however, the Constitution included the clause because of "a very real concern in the founding era" that "a State would refuse to provide for the election of representatives of the Federal Congress." *Inter Tribal Council*, 133 S. Ct. at 2253; *see also* Natelson, *supra*, at 35 (The "decisive argument" was that the "Clause was needed to enable Congress to preserve its own existence.").

Given the intense controversy over the grant of federal preemption power, it is illogical to construe

the Elections Clause to limit a state's power to organize its legislative power as its people see fit.

Summary affirmance is appropriate because existing law already makes this point clear. In addition to *Smiley* and *Hildebrant*, this Court's modern redistricting cases reflect this same concern for the importance of local control over redistricting. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) ("[W]e renew our adherence to the principles" of deferring to state authority over redistricting, "which derive from the recognition that the Constitution leaves with the States the primary responsibility for apportionment of their federal congressional and state legislative districts.").[1] And the Court has repeatedly affirmed that "[d]rawing lines for congressional districts is . . . primarily the duty and responsibility of the State." *Shelby Cnty.*, 133 S. Ct. at 2623 (internal quotation marks and citation omitted).

The Legislature nevertheless contends that federalism principles are not relevant because the legislative power in the Elections Clause is "delegated"

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[1] The Legislature devotes an entire section (§ I.C) to disputing the district court's citation to *Growe v. Emison*, which held that the federal district court should have deferred to state courts before engaging in its own redistricting. (JS at 20-21.) The Legislature contends that the case should be disregarded as merely a "remedial-adjudication precedent." The Legislature's argument misses the point. *Grow* is relevant here because its holding reflects a strong desire that states maintain control over how redistricting is accomplished.

and not "inherent." (JS at 21-22.) This argument ignores entirely the historical context described above. The Legislature offers no explanation for why the Court should interpret the Elections Clause to limit state sovereignty to a greater degree than is already accomplished through the federal preemption power.

Indeed, in support of the argument, the Legislature cites *Inter Tribal Council* for the proposition that "federalism principles . . . are limited in the Elections Clause context." (JS at 21-22.) What the case says, however, is that the limitation on state power comes from the federal preemption power: "the States' role in regulating elections – while weighty and worthy of respect – has always existed subject to the express qualification that it terminates according to federal law." *Inter Tribal Council of Ariz.*, 133 S. Ct. at 2257 (internal quotation marks and citation omitted).

There is simply no support in *Inter Tribal Council* for the Legislature's position that the Elections Clause should be read to infringe on state decision-making any more than Congress deems appropriate.

C. The Legislature's Historical Arguments Are Meritless.

Although the historical record is full of detail regarding Congress's preemption power, the "Framers said precious little about the first part of the Clause, and they said nothing that would help resolve the

issue now before us: what it means to repose a state's Elections Clause power in 'the Legislature thereof.'" *Brown*, 668 F.3d at 1276. The Legislature asserts, however, that the "Founding-Era" historical record shows that the Elections Clause deliberately intended to grant legislative power to the legislature itself and exclude other forms of state legislative action. Despite the lengthy historical dissertation in its brief, the Legislature has not discovered anything that undermines the district court's order.

The Legislature first discusses the development of the Elections Clause language during the Constitutional Convention. (JS at 28-31.) Specifically, the Legislature argues that the Elections Clause derives from Charles Pinckney's proposal that "the 1st branch be elected by the people in such mode as the Legislatures should direct." (JS at 29 (internal quotation marks and citation omitted).) The Legislature further argues that Pinckney had been opposed to direct election of House members, preferring that they (like Senators) be chosen by state legislatures. (JS at 28.) From this, the Legislature argues that the Elections Clause is a compromise meant to divide authority between the people and the state legislature.

Regardless of what Charles Pinckney would say about this case, the Legislature is misreading the purpose of the Election Clause's delegation to the states. The Elections Clause "compromise" was to give

states, rather than Congress, the primary role in legislating the mode of elections to ensure that the federal government did not totally control the elections of Representatives, and to give Congress the power to preempt those state policies. *See, e.g.*, THE FEDERALIST NO. 59 (Alexander Hamilton) (describing that Framers had the choice to lodge "power over elections . . . wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former"); *see also* James Madison, *Debates in the Federal Convention of 1787* 371-72 (Prometheus ed. 2007) (explaining rationale of including congressional preemption power to prevent state legislatures from having an "uncontrouled right" over elections).

Indeed, the Legislature states that the "perhaps more important[ ]" reason for including the delegation of legislative power was to "make 'State Govts. a part of the General System' . . . to protect the interests of less populous states." (JS at 30 (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 360, 365 (M. Farrand ed. 1911)).) If anything, this "more important" purpose undermines the Legislature's position, which would require the federal court to override Arizona's constitution. The convention records do not support the Legislature's position.

The Legislature next cites The Federalist Nos. 44 and 45. Again, the Legislature cribs language from a debate concerning the allocation of power between

states and the federal government, not a debate about the organization of internal state power. From No. 44, the Legislature finds it significant that Madison writes that "the election of the President and Senate will depend in all cases, on the legislatures of the several states. And the election of the House of Representatives will equally depend on the same authority in the first instance." (JS at 32 (quoting THE FEDERALIST NO. 44).) Similarly, the Legislature quotes a passage from No. 45 which assumes that state legislatures would be influencing federal elections. (JS at 32.)

The Legislature assumes too much from these excerpts. Both are part of arguments intended to justify the greater powers the new constitution provided to the federal government. In The Federalist No. 44, Madison defends why several constitutional provisions were necessary to make the federal government function, including the oath requirement. In The Federalist No. 45, titled "The Alleged Danger from the Powers of the Union to the State Governments Considered," Madison is allaying fears of too much federal power with an argument that states retain substantial influence over federal elections.

The Legislature's collection of records helps explain why the Elections Clause balances state and federal power over the operation of elections in the way it does. It sheds little light, however, on the question at issue: does the Elections Clause also act as a limitation on state authority to organize state legislative power in the manner its people desire? This Court and Congress have said it does not. Therefore,

the Court should dismiss this appeal or summarily affirm the three-judge panel's decision.

III. In the Alternative, the Court Should Vacate the Judgment Below Because Whether the Elections Clause Permits Prop 106 Is a Non-Justiciable Political Question That Congress Has Already Answered.

A controversy is a non-justiciable political question when "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) and *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The Legislature's claim presents a political question in two ways.

First, the Elections Clause itself contains a clear and unambiguous "commitment of the issue" to Congress: the states may make elections regulations "but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4. Whatever the Elections Clause may require of states in the absence of congressional action is irrelevant if Congress "make[s]" or "alter[s]" such laws.

This is such a case. Congress has already decided that redistricting may be accomplished however state law dictates, including via ballot measures. 2 U.S.C.

§ 2a sets out a process for the reapportionment of House Representatives. Section 2a(c) spells out what happens if there is an election after a reapportionment but before the state has had a chance to enact a redistricting plan. It states, "[u]ntil a State is redistricted ***in the manner provided by the law thereof*** after any apportionment," elections for Representatives shall occur as set forth in the statute. 2 U.S.C. § 2a(c) (emphasis added).

Congress added the highlighted language specifically to clarify that states may organize the legislative power over redistricting how they see fit, including the use of initiative and referendum. *See Hildebrant*, 241 U.S. at 568-69 (there was "no room for doubt that" Congress amended the statute "for the express purpose, in so far as Congress had power to do it, of excluding" the argument that a referendum could not be used in redistricting).

Before 1911, the reapportionment statute stated that a preexisting districting plan would be in effect "until the legislature of such state" completed redistricting of the new apportionment. *See id.* at 568 (discussing pre-1911 version of statute). In 1911, Congress deleted this language and added the language that is still in the statute today, "in the manner provided by the law thereof." *See id.* (describing amendment to predecessor statute of 2 U.S.C. § 2a(c)).

As the Senator who proposed the amendment explained, "A due respect to the rights, to the established

methods, and to the laws of the respective States requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." 47 Cong. Rec. 3436 (1911).

There is no dispute that Prop 106 is the "manner provided by the law" of Arizona. 2 U.S.C. § 2a(c). Congress has therefore rejected the Legislature's position, and the Constitution expressly gives it authority to do so.

Second, the Legislature's claim is not justiciable for the same reasons the constitutional claim in *Hildebrant* was rejected. Like there, the Legislature's argument is that "including [Prop 106] within state legislative power . . . is repugnant to" the Elections Clause. 241 U.S. at 569. And, as in *Hildebrant*, the claim "must rest upon the assumption that to include [Prop 106] in the scope of the legislative power is to introduce a virus which destroys that power," thereby violating the guaranty clause. The Legislature makes this assumption when it contends that Prop 106 is unlawful because the Legislature does not have "meaningful" influence over the Commission, and that the Commission is "fully insulated" and "outside Arizona's legislative process." (JS at 16-19.) These concerns are no different from the concerns with the referendum process raised in *Hildebrant*. They "present[ ] no justiciable controversy, but involve[ ] the exercise by Congress of the authority vested in it by the Constitution." *Hildebrant*, 241 U.S. at 569 (citing

Pac. States Tel. & Tel. Co., 223 U.S. 118 (challenge to initiative process held non-justiciable)).

CONCLUSION

The appeal should be dismissed for want of a substantial federal question. In the alternative, the judgment should be summarily affirmed or vacated with instructions to dismiss for lack of subject matter jurisdiction.

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REPLY BRIEF

No. 13-1314

In the
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

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APPELLANT'S REPLY BRIEF

Until the divided decision below, no court, much less this Court, had ever held that a state legislature may be completely divested of its authority to prescribe congressional redistricting. That unprecedented outcome simply cannot be squared with the clear command of the Elections Clause that the "Times, Places and Manner" of holding congressional elections "shall be prescribed in each State *by the Legislature thereof*." U.S. Const. art. I, § 4, cl. 1 (emphasis added).

The IRC's efforts to defend the majority's atextual and limitless construction of the Elections Clause are meritless. The IRC boldly contends that Proposition 106 does not accomplish what its proponents promised—namely, the complete removal of all redistricting authority from the Legislature. But Proposition 106 plainly removes the Legislature (and Governor, for good measure) from the redistricting process, and the two general state constitutional provisions the IRC cites do not preserve any meaningful residual role for the Legislature.

Nor have *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), or *Smiley v. Holm*, 285 U.S. 355 (1932), resolved this question in the IRC's favor. Both decisions expressly contemplate a central role for the state legislature in redistricting, and neither stands for the far-reaching proposition that the word "Legislature" can be read out of the Elections Clause.

As the constitutional text, the historical record, and this Court's cases demonstrate, the Framers were well aware of the differences between the "Legislature" and other entities to whom they could

have assigned the role of "prescrib[ing]" regulation of federal elections. Their assignment of this delegated power specifically to the most accountable branch of state government—"the Legislature thereof"—cannot be disregarded.

Finally, the question presented is plainly justiciable. The IRC's argument that the question has been constitutionally committed to Congress misreads both constitutional and statutory text; moreover, contrary to the IRC's insinuations, this case is not and has never been about the Guarantee Clause. Rather, it is about the vitally significant issue of whether the Elections Clause means what it says. The decision below is plainly incorrect and should be reversed, but at a minimum this Court's plenary review is warranted to address this question of obvious national importance, which will continue to arise as States take ever-bolder steps to take "politics" and state legislatures out of the redistricting process.

I. Whether The Elections Clause Permits A Legislature To Be Completely Divested Of Any Authority To Prescribe Congressional Redistricting Lines Is A Substantial Question That Warrants Plenary Review.

A. Proposition 106 Completely Divests the Arizona Legislature of Redistricting Authority.

At the outset, the Court should reject the IRC's attempt to sidestep the substantial question presented by contending that Proposition 106 "does not fully 'remove' or 'divest' the Legislature's authority over redistricting." Br. 11. This contention is belied by the purpose, text, and effect of Proposition 106. The

initiative's authors expressly stated that it would "take[] the redistricting power away from the Arizona Legislature." App. 42-43. The official ballot provided that voting for the initiative meant "removing redistricting authority from the Arizona Legislature." 2000 Ballot Propositions, at 60, http://tinyurl.com/prop106ballot. The plain text of Proposition 106 accomplishes this stated goal by granting the IRC the power to redistrict immune from legislative override. Indeed, the IRC's very name proclaims its independence from the Legislature.

The IRC and its *amici* understood all of this in the proceedings below. In its motion to dismiss, the IRC argued that the Legislature seeks to "take back the power to draw congressional districts." Defs.' Mot. to Dismiss 2, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 02-1211 (D. Ariz. Aug. 10, 2012) (Dkt. 16). The initiative's authors, participating as *amici*, asserted that "Proposition 106 was intended to remove responsibility for redistricting from the Arizona Legislature." Br. of *Amici Curiae* 3, *Ariz. State Legislature*, *supra* (Dec. 19, 2013) (Dkt. 42). As the majority found, Proposition 106 accomplished that goal: it "removed congressional redistricting authority from the Legislature." App. 3.

The IRC's answer to all this is to advance an argument the majority understandably ignored: it contends that the Legislature "retains the power to pass a redistricting plan and refer it to the voters for approval." Br. 11. But the two constitutional provisions cited for that proposition do not support the IRC's claim. Article XXI, § 1 simply allows the Legislature to submit proposed constitutional

amendments to a vote of the people. This amendment process is no more evidence of the Legislature's power to establish redistricting lines than Congress' general authority to propose amendments to the United States Constitution is evidence of a congressional power to do things forbidden by the current constitutional text. *See* U.S. Const. amend. V.

The IRC's argument concerning art. IV, pt. 1, § 1(15) is even more of a reach. That general provision was added to the Arizona Constitution in 1998 by an initiative aimed at *reducing* the Legislature's ability to change voter-approved laws, and it merely provides that "this section" (*i.e.*, § 1) does not limit the Legislature's ability to submit referendum measures to the people. Proposition 106 *postdates* this savings clause, is located *outside* the relevant article IV, pt. 1, § 1, and specifically states that the IRC "shall ... establish *final* boundaries," Ariz. Const. art. IV, pt. 2, § 1(16) (emphasis added). Arizona law thus does not give the Legislature the power to "create a redistricting plan and seek voter approval of it," Br. 12, and the IRC cites no Arizona decision even suggesting to the contrary.

Notably, while the IRC presses theories even the majority rejected, the IRC declines to defend the majority's claim that Proposition 106 "has not entirely divested the legislature of any redistricting power" because the Legislature "retains the right to select the IRC commissioners" and "the IRC is required to consider the Legislature's suggested modifications" to its redistricting lines. App. 19 n.4. That reasoning is plainly wrong, *see* App. 22-23 (Rosenblatt, J.,

dissenting); J.S. 17-19, and the IRC understandably abstains from defending it.

In short, Proposition 106 accomplished exactly what its proponents promised: it took the Legislature out of redistricting. Whatever its policy merits, it is fairly described as the "most radical[] ... departure[] from the traditional legislative redistricting model." Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1811-12 (2012). Whether that radical effort to "de-politicize" redistricting can be reconciled with the Constitution's deliberate decision to vest such responsibilities in the most politically-accountable branch of state government is thus squarely presented and substantial.

B. This Court Has Never Held That Completely Divesting a Legislature's Authority To Prescribe Congressional Redistricting Lines Is Consistent With the Elections Clause, and No Precedent Supports That Far-Reaching Result.

The IRC's need to deny Proposition 106's plain purpose and effect stems from the reality that no case, other than the divided decision below, holds that the complete removal of a legislature's authority over redistricting can be squared with the Elections Clause.

The IRC relies heavily on *Hildebrandt* and *Smiley*. But those decisions do not support the IRC, let alone render the term "Legislature" in the Elections Clause a nullity. Indeed, both decisions take as their foundation what the IRC rejects: the constitutional role of state legislatures.

Hildebrandt is problematic for the IRC both doctrinally and factually. Doctrinally, *Hildebrandt* focuses on the Guarantee Clause, not the Elections Clause. And, factually, the referendum was "a *component part* of the legislative authority empowered to deal with" congressional redistricting, 241 U.S. at 567 (emphasis added)—not, as here, a complete displacement of that authority. As explained, the Ohio Legislature continued to play an active role in redistricting after the referendum was enacted. *See* J.S. 11.

Smiley is doubly unhelpful to the IRC. First, *Smiley* rejects the argument—essential to the IRC's claim—that the Elections Clause's reference to "by the Legislature thereof" is just an awkward way of referring to any procedure adopted by the State. *See* 285 U.S. at 365 (agreeing with lower court that "Legislature" means "the representative body which made the laws of the people," and not "the state or ... the lawmaking power of the state" (quotation marks omitted)); J.S. 12-13.

Second, *Smiley* stands for the modest proposition that the Election Clause's reference to "the Legislature" does not immunize the legislature from the normal constraints on the legislative process, such as the gubernatorial veto. *Smiley* does not remotely support the proposition that any limitation on the Legislature, including its complete ouster from redistricting, is valid so long as it is accomplished via a lawmaking process authorized by state law. Here, Proposition 106 establishes a redistricting process that is in complete derogation of the normal lawmaking process because it eliminates both a

meaningful legislative role and any prospect of a gubernatorial veto. *Smiley* does not authorize such a radical innovation. To the contrary, *Smiley* rejects the only proposition that could save Proposition 106—namely, that "by the Legislature thereof" actually means "by the State."[1]

Notably, the IRC makes no effort to defend the majority's repeated reliance upon *Growe v. Emison*, 507 U.S. 25 (1993), to reject the contention that a state legislature may not be completely divested of its redistricting power. The IRC cites *Growe* only for the bland proposition that it "reflects a strong desire that states maintain control over how redistricting is accomplished." Br. 23. But the majority invoked *Growe* for entirely different reasons, *see* App. 15-16, 18, that are both central to its holding and manifestly incorrect. *See* J.S. 20-21. *Growe* sheds no light on whether the Elections Clause places some outer limit on efforts to oust state legislatures from congressional redistricting.

The IRC contends (at 12) that "[t]here is no conflict among federal courts" on the question presented. But in exercising its appellate—as opposed

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[1] The IRC notes (at 9-10) that the Arizona Supreme Court has held that the "'Commission acts as a legislative body.'" *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 684 (Ariz. 2009). But that court so held because "redistricting is ... a legislative task," *id.*, underscoring the limitlessness of the IRC's position: any entity that undertakes redistricting satisfies the Elections Clause, because it undertakes redistricting. The Elections Clause prevents this tautology by vesting federal redistricting authority in "the Legislature," not "a legislative body." And the IRC does not, and cannot, claim that it is the Legislature.

to certiorari—jurisdiction, this Court routinely undertakes plenary review absent a conflict. *See, e.g.*, *Ala. Democratic Conf. v. Alabama*, 134 S. Ct. 2697 (2014); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

In all events, the IRC's claim depends on its flawed argument that Proposition 106 does not accomplish its avowed purpose of taking the Legislature out of redistricting. The IRC principally invokes *Brown v. Secretary of State of Florida*, 668 F.3d 1271 (11th Cir. 2012), which rejected an Elections Clause challenge to an initiative that set "standards for the legislature to use in the congressional redistricting process." *Id.* at 1273. But *Brown* emphasized that the initiative there "simply informs the process *by which the legislature* is to go about its task of redistricting." *Id.* at 1279 (emphasis added). It is one thing for an initiative to put some constraints on the legislature's ability to redistrict, and quite another to eliminate the legislative redistricting power altogether. Indeed, *Brown* signaled that a different outcome would have emerged had the initiative "so limit[ed] the state legislature's discretion as to eviscerate its constitutionally delegated power and effectively exclude the legislature from the redistricting process." *Id.* at 1280. *Brown* thus underscores that other courts apply a measured test to incursions on the legislature's redistricting responsibilities, which is incompatible with the approach of the majority below.[2]

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[2] Neither of the other decisions the IRC cites remotely addresses this question. Indeed, *Smith v. Clark*, 189 F. Supp. 2d

The IRC's efforts to dismiss the Framers' careful deliberations as largely irrelevant only underscore the need for this Court's plenary review. The answer to the constitutional question presented here ultimately lies in the constitutional text and "what Charles Pinckney [and the other Framers] would say about this case," Br. 25, and the IRC has no persuasive answer to either. The IRC's effort to dismiss the Framing-era evidence as irrelevant because the Framers could not anticipate the popular initiative process, *id.* at 20-21, is a diversion. The ultimate constitutional question here does not depend on the fact that Proposition 106 was enacted by referendum. Any state effort to oust the legislature from the congressional-redistricting process raises serious questions under the Elections Clause whether it is accomplished via referendum, other means of constitutional amendment, executive fiat, or even bicameralism and presentment.

The IRC fares no better in emphasizing (at 21-23) that the Elections Clause emerged in part based on concerns that Congress would exercise too much power vis-à-vis the States. Those concerns did not manifest themselves in a text granting exclusive authority to States to regulate federal elections as they see fit. Rather, a specific compromise emerged granting particular authority to the most politically-accountable branch of state governments. The Framers clearly did not contemplate a process

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548 (S.D. Miss. 2002), was an "alternative holding" that this Court vacated, *see Branch v. Smith*, 538 U.S. 254, 265-66 (2003). Thus the IRC cites not just *dicta* but vacated *dicta*.

whereby the regulation of federal elections would be taken from "the Legislature" and granted to an entity insulated from the normal political process.[3]

At bottom, the IRC's position depends on reading "Legislature" out of the constitutional text entirely, and there is no historical evidence to support that rewrite. Instead, the IRC picks away at the Legislature's evidence and proclaims that it "sheds little light" on the question presented. Br. 27. But what the historical evidence overwhelmingly demonstrates is that the Framers knew how to distinguish between state legislatures and other entities. Consequently, their decision to employ the specific term "Legislature" in the Elections Clause cannot simply be disregarded, as the IRC and the majority below would have it.

C. The Question Presented Is Justiciable and Important.

The IRC's final effort to avoid plenary review—its contention that the question presented is a nonjusticiable political question—is plainly wrong.[4] In an argument ignored (and thus implicitly rejected)

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[3] The IRC suggests (at 18-20) that the Framers' choice of the word "Legislature" is irrelevant because the "Legislature" can serve different constitutional functions depending on the "nature of the particular action in view," *Smiley*, 285 U.S. at 366. But the critical point is that whatever function the Constitution ascribes to the Legislature in a particular context, the Framers specified that in each instance—including the Elections Clause—it is *the Legislature* that undertakes that function, not some other entity the Framers could have selected or authorized the States to select.

[4] The IRC has abandoned the standing and laches arguments it unsuccessfully advanced below.

by every member of the panel below, the IRC contends (at 28-30) that "the Elections Clause itself contains a clear and unambiguous 'commitment of the issue' to Congress" by granting Congress the residual power to override state election laws, which Congress has exercised in enacting 2 U.S.C. § 2a(c). Br. 28. This argument is deeply flawed. First, it clashes with this Court's recognition in *Smiley* that "Congress [has] no power to alter article 1, § 4" and that the federal statute is merely a "legislative recognition of the nature of the authority ... conferred by the constitutional provision." 285 U.S. at 372. Second, Congress' power to override state legislation addressing federal elections is no substitute for judicial review. The Supremacy Clause generally grants Congress a power to displace state law, but that in no way diminishes the courts' ability to examine non-displaced state law for conformity with the Constitution. The Election Clause works no differently, as evidenced by decisions like *Smiley* and *Brown* addressing Elections Clause challenges even though 2 U.S.C. § 2a(c) was already on the books. *See Smiley*, 285 U.S. at 362 n.1. And third, nothing in that statutory provision purports to immunize from judicial review any redistricting accomplished in accordance with state law. This Court routinely reviews redistricting accomplished in accordance with state law for conformity with the Equal Protection Clause. There is no reason for a different rule when state law conflicts with the Elections Clause.

The IRC also contends that the Legislature's claim is nonjusticiable because it "'rest[s] upon the assumption that'" Proposition 106 violates the Guarantee Clause. Br. 30 (quoting *Hildebrandt*, 241

U.S. at 569). But that is just wishful thinking. The Legislature has never advanced a Guarantee Clause challenge. *See* App. 46-48. To the contrary, the Legislature straightforwardly challenges the purposeful and complete divestment of its redistricting authority notwithstanding the Elections Clause's plain command that such regulation is to be "prescribed" by "the Legislature."

That question, moreover, is one of great national importance. States around the Nation are experimenting with ever-bolder measures concerning congressional redistricting. *See generally* Cain, *supra*, at 1813-21. Arizona's Proposition 106 is a radical measure perceived by some as representing "the cutting edge of redistricting reform," *id.* at 1830—with the state legislature quite literally cut out of the process completely. But whatever the policy merits of these efforts to de-politicize the redistricting process, the Framers clearly had a different view. Their conscious decision to grant this power to the most politically-accountable branch of state government is at odds with efforts to take legislators out of the redistricting process. This case involves an effort to oust the Legislature entirely, and thus presents an ideal vehicle for this Court's review. If the Constitution's reference to "by the Legislature thereof" really means no more than "by the State," then this Court can say as much. But if the Elections Clause really means what it says, and whatever deference is given to the States does not extend to the complete ouster of the Legislature, then this Court should say so and reverse the decision below. In either case, this Court's plenary review is needed.

CONCLUSION

This Court should note probable jurisdiction and set the case for full briefing and oral argument.

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July 14, 2014

JOINT APPENDIX

No. 13-1314

In the
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

JOINT APPENDIX

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First Amended Complaint in the United States District Court for the District of Arizona (July 20, 2012) [Doc. 12] JA-13

Ariz. 2000 Ballot Propositions: Proposition 106 (Filed Oct. 3, 2013) [Doc. 33-1] JA-50

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Jurisdictional Statement:

Appendix A

Order of the United States District Court for the District of Arizona (Feb. 21, 2012) .. App.2

Appendix B

Judgment of the United States District Court for the District of Arizona (Feb. 24, 2012) App.24

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. 12-cv-01211

ARIZONA STATE LEGISLATURE,

v.

ARIZONA INDEPENDENT REDISTRICTING COMM'N, ET AL.,

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
6/7/2012	1	COMPLAINT. Filing fee received: $350.00, receipt number PHX 0970-6862252, filed by Arizona State Legislature (submitted by Joshua Carden). (Attachments: #1 Exhibit, #2 Civil Cover Sheet) (REK) (Entered: 06/07/2012)
		* * *
6/8/2012	3	MOTION Motion to Convene a Three-Judge Statutory Court by Arizona State Legislature. (Carden, Joshua) (Entered: 06/08/2012)
		* * *
6/13/2012	7	ORDER that Plaintiff's Motion to Convene a Three-Judge Statutory Court (Doc. 3) is granted. IT IS FURTHER

Date Filed	#	Docket Text
		ORDERED that the Clerk of the Court shall notify the Honorable Alex Kozinski, Chief Judge of the Ninth Circuit Court of Appeals, of this Order so that he may designate the other two judges of the three–judge court as required by 28 U.S.C. § 2284(b)(1). Signed by Senior Judge Paul G Rosenblatt on 6/13/2012. (KMG) (Entered: 06/13/2012)
		* * *
6/27/2012	9	MOTION for Reconsideration *OF THE COURTS JUNE 13, 2012 ORDER GRANTING PLAINTIFFS MOTION TO CONVENE A THREE–JUDGE STATUTORY COURT* by Arizona Independent Redistricting Commission, Scott D Freeman, Jose M Herrera, Colleen Mathis, Linda C McNulty, Richard Stertz. (Attachments: #1 Text of Proposed Order) (Windtberg, Kristin) (Entered: 06/27/2012)
7/3/2012	10	ORDER, plaintiff shall file its response to AIRC Defendants' Motion for Reconsideration 9 of the Court's June 13, 2012 Order Granting Plaintiff's Motion to

Date Filed	#	Docket Text
		Convene a Three–Judge Statutory Court, no later than 7/20/12, defendants shall file their reply no later than 7/30/12. Signed by Senior Judge Paul G Rosenblatt on 7/3/12. (REW) (Entered: 07/03/2012)
7/20/2012	11	RESPONSE in Opposition re 9 MOTION for Reconsideration *OF THE COURTS JUNE 13, 2012 ORDER GRANTING PLAINTIFFS MOTION TO CONVENE A THREE–JUDGE STATUTORY COURT* filed by Arizona State Legislature. (Carden, Joshua) (Entered: 07/20/2012)
7/20/2012	12	AMENDED COMPLAINT *FIRST* against All Defendants, filed by Arizona State Legislature. (Attachments: #1 Exhibit A) (Carden, Joshua) (Entered: 07/20/2012)
7/30/2012	13	REPLY to Response to Motion re 9 MOTION for Reconsideration *OF THE COURTS JUNE 13, 2012 ORDER GRANTING PLAINTIFFS MOTION TO CONVENE A THREE–JUDGE STATUTORY COURT AIRC Defendant's Reply in Support of their Motion for Reconsideration*

Date Filed	#	Docket Text
		of the Court's June 13, 2012 Order Granting Plaintiff's Motion to Convene a Three-Judge Statutory Court filed by Arizona Independent Redistricting Commission, Ken Bennett, Scott D Freeman, Jose M Herrera, Colleen Mathis, Linda C McNulty, Richard Stertz. (OGrady, Mary) (Entered: 07/30/2012)
		* * *
8/10/2012	15	*Defendant Ken Bennett's* ANSWER to 12 Amended Complaint *(First)* by Ken Bennett. (Forney, Michele) (Entered: 08/10/2012)
8/10/2012	16	*MOTION to Dismiss Case by Arizona Independent Redistricting Commission, Scott D Freeman, Jose M Herrera, Colleen Mathis, Linda C McNulty, Richard Stertz. (Attachments: #1 Exhibit) (Kanefield, Joseph) *Modified to correct motion type on 8/13/2012 (TLJ). (Entered: 08/10/2012)
8/27/2012	17	RESPONSE to Motion re 16 MOTION to Dismiss for Failure to State a Claim filed by Arizona

Date Filed	#	Docket Text
		State Legislature. (Carden, Joshua) (Entered: 08/27/2012)
9/7/2012	18	REPLY to Response to Motion re 16 MOTION to Dismiss for Failure to State a Claim filed by Arizona Independent Redistricting Commission, Scott D Freeman, Jose M Herrera, Colleen Mathis, Linda C McNulty, Richard Stertz. (Attachments: #1 Exhibit) (Kanefield, Joseph) (Entered: 09/07/2012)
		* * *
8/14/2013	24	ORDER that Plaintiff's 23 Rule 1 Motion is denied as moot. ORDERED that the AIRC Defendants' 9 Motion for Reconsideration is denied. IT IS FURTHER ORDERED that the Clerk of the Court shall notify the Honorable Alex Kozinski, Chief Judge of the Ninth Circuit Court of Appeals, of this Order so that he may designate the other two judges of the three-judge court as required by 28 U.S.C. § 2284(b)(1). Signed by Senior Judge Paul G Rosenblatt on 8/12/2013.(LFIG) (Entered: 08/14/2013)

Date Filed	#	Docket Text
8/23/2013	25	ORDER Designating United States District Court Composed of Three Judges Pursuant to Section 2284, Title 28, U.S.C. Judge Mary M Schroeder designated and appointed to sit with Judge Paul G Rosenblatt and Judge G Murray Snow to hear and determine this matter as the District Court for the District of Arizona. Signed by Ninth Circuit Judge Alex Kozinski on 8/21/13. (REW) (Entered: 08/23/2013)
		* * *
10/3/2013	33	MOTION for Preliminary Injunction and for a Consolidated Hearing and Trial on the Merits and Request for Judicial Notice by Arizona State Legislature. (Attachments: #1 Appendix) (REW) (Entered: 10/03/2013)
		* * *
10/18/2013	36	NOTICE re No Position Regarding Plaintiff's Motion for Preliminary Injunction by Ken Bennett re 33 MOTION for Preliminary Injunction (Forney, Michele) (Entered: 10/18/2013)

Date Filed	#	Docket Text
10/18/2013	37	RESPONSE to Motion re 33 MOTION for Preliminary Injunction *[DEFENDANT ARIZONA INDEPENDENT REDISTRICTING COMMISSION AND DEFENDANT COMMISSIONERS RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, CONSOLIDATION, AND JUDICIAL NOTICE]* filed by Arizona Independent Redistricting Commission, Scott D Freeman, Jose M Herrera, Colleen Mathis, Linda C McNulty, Richard Stertz. (Attachments: #1 Exhibit A, #2 Attachments) (OGrady, Mary) (Entered: 10/18/2013)
10/28/2013	38	REPLY to Response to Motion re 33 MOTION for Preliminary Injunction filed by Arizona State Legislature. (Carden, Joshua) (Entered: 10/28/2013)
		* * *
12/19/2013	41	ORDER: Motion for Leave to File Brief of Amici Curiae 39 is granted and the Clerk of the Court shall file the Brief of Amici Curiae (lodged Doc. 39-1). A

Date Filed	#	Docket Text
		response must be filed no later than Wednesday, January 8, 2014. Plaintiff's Request for Judicial Notice (part of Doc. 33) is granted. Plaintiff's Motion for a Consolidated Hearing and Trial on the Merits (part of Doc. 33) is granted as follows: The Court will hear counsels' oral argument on Defendants Arizona Redistricting Commission and Commissioners Mathis, McNulty, Herrera, Freeman, and Stertz's Motion to Dismiss 16 and Plaintiff's Motion for Preliminary Injunction (part of Doc. 33) on Friday, January 24, 2014, at 10:00 a.m. in Courtroom 601 of the Sandra Day OConnor United States Courthouse in Phoenix. Judges Schroeder and Snow concur in this Order. Signed by Senior Judge Paul G Rosenblatt on 12/18/2013. (ALS) (Entered: 12/19/2013)
12/19/2013	42	BRIEF OF AMICI CURIAE by Arizona Advocacy Network, Dennis Burke, Inter Tribal Council of Arizona Incorporated, League of Women Voters of

Date Filed	#	Docket Text
		Arizona, Bart Turner. (ALS) (Entered: 12/19/2013)
12/23/2013	43	*MOTION to Dismiss for Lack of Jurisdiction *for Lack of Standing* by Arizona Independent Redistricting Commission, Scott D Freeman, Jose M Herrera, Colleen Mathis, Linda C McNulty, Richard Stertz. (OGrady, Mary) *Modified to correct Motion event on 1/21/2014* (REW). (Entered: 12/23/2013)
1/8/2014	44	RESPONSE BRIEF by Arizona State Legislature *PLAINTIFFS RESPONSE TO BRIEF OF AMICI CURIAE.* (Carden, Joshua) (Entered: 01/08/2014)
1/20/2014	45	*RESPONSE to Motion for Lack of Jurisdiction re 43 MOTION to Dismiss *for Lack of Standing* filed by Arizona State Legislature. (Carden, Joshua) *Modified to correct Response event on 1/21/2014* (REW). (Entered: 01/20/2014)
1/24/2014	46	MINUTE ENTRY for proceedings held before Senior Judge Paul G Rosenblatt: Three–Judge Court Hearing on pending motions held 1/24/2014.

Date Filed	#	Docket Text
		Oral argument presented. Motions to Dismiss 16 and 43 and Motion for Preliminary Injunction 33 are taken under advisement. (Court Reporter Candy Potter.) Hearing held 10:03 AM to 11:17 AM. (LMR) (Entered: 01/24/2014)
		* * *
1/30/2014	48	REPLY to Response to Motion re 43 MOTION to Dismiss for Lack of Jurisdiction filed by Arizona Independent Redistricting Commission, Scott D Freeman, Jose M Herrera, Colleen Mathis, Linda C McNulty, Richard Stertz. (Kanefield, Joseph) (Entered: 01/30/2014)
		* * *
1/30/2014	48	REPLY to Response to Motion re 43 MOTION to Dismiss for Lack of Jurisdiction filed by Arizona Independent Redistricting Commission, Scott D Freeman, Jose M Herrera, Colleen Mathis, Linda C McNulty, Richard Stertz. (Kanefield, Joseph) (Entered: 01/30/2014)
		* * *
2/21/2014	52	ORDER, Defendants' Motion to Dismiss for Failure to State a

Date Filed	#	Docket Text
		Claim 16 is granted; Defendants' Motion to Dismiss for Lack of Jurisdiction for Lack of Standing 43 is denied; Plaintiff's Motion for Preliminary Injunction 33 is denied as moot. Circuit Judge Mary M. Schroeder concurs with this Order. District Paul G. Rosenblatt concurrs in part and dissents in part. Signed by Judge G Murray Snow on 2/21/14. (REW) (Entered: 02/21/2014)
2/24/2014	53	CLERK'S JUDGMENT – pursuant to the Court's Order of February 21, 2014, granting Defendants' Motion to Dismiss, judgment is hereby entered for Defendants. Plaintiff shall take nothing by way of the Amended Complaint. The Amended Complaint and this action are hereby dismissed. (REW) (Entered: 02/24/2014)
2/26/2014	54	NOTICE OF APPEAL to the Supreme Court re: 53 Clerks Judgment, 52 Order by Arizona State Legislature. (Carden, Joshua) *Modified to reflect Supreme Court appeal on 2/26/2014* (REW). (Entered: 02/26/2014)

Date Filed	#	Docket Text
		* * *
5/20/2014	55	US Supreme Court Case Number re: 54 Notice of Appeal. Case number 13-1314, Supreme Court. (REW) Modified on 5/20/2014 (REW). (Entered: 05/20/2014)
10/6/2014	56	NOTICE of Entry of ORDER of Supreme Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits (see document for complete details), re: 13-1314 54 Notice of Appeal. (REW) (Entered: 10/07/2014)

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CV-12-01211-PHX-PGR

ARIZONA STATE LEGISLATURE,

Plaintiff,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, AND COLLEEN MATHIS, LINDA C. MCNULTY, JOSÉ M. HERRERA, SCOTT D. FREEMAN, AND RICHARD STERTZ, members thereof, in their official capacities; KEN BENNETT, ARIZONA SECRETARY OF STATE, in his official capacity,

Defendants.

Apportionment Matter: Three-Judge Panel
Requested Pursuant to 28 U.S.C. § 2248

Filed: July 20, 2012
Document: 12

FIRST AMENDED COMPLAINT

For its First Amended Complaint, the Arizona State Legislature alleges as follows:

NATURE OF THE ACTION

1. The Elections Clause of the United States Constitution delegates the authority over the redistricting of congressional districts to the Legislatures of the States. Contrary to this

constitutional delegation, Proposition 106 (adopted in 2000) amended the Arizona Constitution—removing that authority from the Arizona State Legislature ("Legislature") and vesting it instead with the "Independent Redistricting Commission" ("IRC"). The Legislature brings this action requesting the Court to a) declare that Proposition 106 is unconstitutional to the extent it removes congressional-redistricting authority from the Legislature, b) declare that the congressional district maps adopted by the IRC are unconstitutional, and c) enjoin the Defendants from enforcing or implementing any congressional redistricting plan from the IRC beginning the day after the 2012 congressional election is held in Arizona. Though the Legislature seeks permanent injunctive relief, it does not seek immediate relief as to the 2012 congressional election because the current IRC plan has already been certified and the 2012 election cycle is already well underway.

PARTIES

2. Plaintiff Arizona State Legislature is the elected-representative portion of the legislative authority of the State of Arizona. Ariz. Const. art. IV, pt. 1 § 1. The Legislature consists of the thirty-member State Senate and the sixty-member House of Representatives. On May 2, 2012, both chambers authorized the filing of this action by majority vote. *See* Exhibit A (excerpts from the Journals of the Senate and House). The Legislature is directly elected by the People of Arizona.

3. Defendant IRC is a commission established "to provide for the redistricting of congressional and state legislative districts." Ariz. Const. art IV, pt. 2, § 1 (¶ 3).

The IRC can sue and be sued in "legal actions regarding [its] redistricting plan." *Id.* § 1 (¶ 20). The IRC consists solely of unelected appointees.

4. Defendants Colleen Mathis, Linda C. McNulty, José M. Herrera, Scott D. Freeman, and Richard Stertz currently hold office as members of the IRC and are named herein as defendants solely in their official capacities. All of these defendants reside within the District of Arizona.

5. Defendant Ken Bennett currently holds the office of Arizona Secretary of State, and is charged with certain official duties with respect to the conduct of Arizona elections, including receiving certified legislative and congressional districts from the IRC. Ariz. Const. art. IV. pt. 2, § 1 (¶ 17). Defendant Bennett is named herein solely in his official capacity in view of his election responsibilities.

JURISDICTION

6. This court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1367, 2201, 2202, and 2284.

VENUE

7. Venue is proper in the District of Arizona under 28 U.S.C. § 1391.

THREE-JUDGE PANEL REQUESTED

8. Because this is an action "challenging the constitutionality of the apportionment of congressional districts," the Legislature requests that a three-judge court be convened pursuant to 28 U.S.C. § 2284 to try this action and to conduct all other proceedings as required by law.

FACTS

Redistricting Prior to Proposition 106

9. The United States Constitution mandates that the times, places, and manner of congressional elections "shall be prescribed in each State by the Legislature thereof. ." U.S. Const. Art. I, § 4, cl. 1 (the "Elections Clause").

10. From 1912 to 2000, the Arizona Constitution recognized that the responsibility and authority of establishing both congressional and legislative district lines resided in the Legislature. Ariz. Const. art. XXII, § 12; art. IV, pt. 1, § 1 (West Historical Notes).

11. Prior to 2000, the Legislature established congressional lines in the following manner:

a. Redistricting measures were introduced as proposed legislation.

b. The proposed redistricting legislation was reviewed, and debated in a bipartisan, joint committee on redistricting.

c. The proposed redistricting legislation, along with any recommended committee amendments, was recommended to the body as a whole, which had the power to either approve the recommendations of the joint committee or make any other changes.

d. Proposed redistricting legislation was read on three separate days on the floor, and after final passage, it was sent to the Governor for approval or disapproval, in accordance with Article IV, part 2, section 12 of the Arizona Constitution.

e. The Governor had the authority to approve, disapprove, or take no action on redistricting legislation. Ariz. Const. art. IV, pt. 2, § 12; art. V, § 7.

12. Not since 1981 has an Arizona Governor disapproved of redistricting legislation. In that year, Governor Bruce Babbitt vetoed legislative and congressional district lines approved by the Legislature. The Legislature called itself into special session and overrode the Governor's veto, pursuant to Article V, section 7 of the Arizona Constitution.

In 2000, Proposition 106 Removed the Legislature and the Governor from the Redistricting Process

13. On September 13, 1999, an organization identified as "Fair Districts, Fair Elections c/o Arizona Common Cause, Inc." filed an application with the Office of the Arizona Secretary of State to circulate initiative petitions.

14. On July 6, 2000, "Fair Districts, Fair Elections" successfully filed its eponymous initiative petition with the Arizona Secretary of State. Arizona Secretary of State, 2000 General Election: Ballot Measures, "Fair Districts, Fair Elections" http://www.azsos.gov/election/2000/General/ballotmeasures.htm (last visited June 4, 2012).

15. The application included the following short title:

> This citizen-sponsored Arizona Constitutional amendment will create a new "citizens' independent redistricting commission" to draw new legislative and

> congressional district boundaries after each U.S. Census. This amendment takes the redistricting power away from the Arizona Legislature and puts it in the hands of a politically neutral commission of citizens who are not active in partisan politics and who will serve without pay to create fair districts that are not "gerrymandered" for any party's or incumbent's advantage.

Id.

16. The Arizona Secretary of State designated the measure as Proposition 106 ("Prop. 106") and placed Prop. 106 on the 2000 general election ballot.

17. The measure passed with 56% of applicable votes cast. Arizona Secretary of State, *State of Arizona Official Canvass* (2000), http://www.azsos.gov/election/2000/General/Canvass2000GE.pdf (last visited June 7, 2012).

18. Prop. 106 amends Article IV, part 2, § 1 of the Arizona Constitution by striking language, adding language to pre-existing paragraphs, and inserting twenty-one new paragraphs. *See* Arizona Secretary of State, Ballot Propositions & Judicial Performance Review: November 7, 2000 General Election 54-55 (2000), http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf (last visited June 7, 2012).

19. Prop. 106 removes entirely from the Legislature the authority to prescribe legislative and congressional district lines and reassigns that authority wholly to the IRC—a new entity created by Prop. 106.

20. Prop. 106 also prescribes the process by which the IRC members are appointed and the process and procedures by which the IRC is to establish legislative and congressional district lines.

21. Prop. 106 eliminates entirely the Legislature's prescriptive role in congressional redistricting, and creates a new and extremely limited role:

a. An opportunity to submit nonbinding recommendations to the IRC (Ariz. Const. art. IV. pt. 2, § 1 (¶ 16)); and

b. The obligation to make appropriations for the operation of the IRC (*Id.* at § 1 (¶ 18)).

22. Prop. 106 gives each of the individual leaders of the Legislature—the Speaker and Minority Leader of the House of Representatives and the President and Minority Leader of the State Senate—one appointment to the five-member IRC. *Id.* at § 1 (¶ 6).

23. The four legislative leaders must choose their four appointments from a pool of only ten persons created by the Commission on Appellate Court Appointments ("Appellate Commission"). *Id.* at § 1 (¶ 5). The Commission on Appellate Court Appointments is an appointed body that exists to screen nominees to Arizona's state-appellate courts, and submit those nominees to the Governor for appointment. Ariz. Const. art. VI. §§ 36 and 37.

24. If a legislative leader fails to make an appointment in the prescribed time frame, the Appellate Commission makes the appointment instead. Ariz. Const. art. IV, pt. 2, § 1 (¶ 7).

25. The four appointed members of the IRC must then choose their own fifth and final member from a

pool of only five persons created by the Appellate Commission. *Id.* at § 1 (¶ 8). If the four members of the IRC fail to select a fifth member, the Appellate Commission makes the selection instead. *Id.*

26. Once appointed, members of the IRC can only be removed by the Governor with concurrence of two-thirds of the Senate for "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." *Id.* at § 1 (¶ 10).

The IRC Certifies a New Congressional District Map in Arizona For 2012 and Beyond

27. On January 17, 2012, the IRC approved a "final congressional map" and forwarded it to the U.S. Department of Justice for preclearance. The same day, the IRC certified the congressional districts to the Arizona Secretary of State.

28. On April 9, 2012, the Department of Justice precleared the IRC's congressional maps.

29. Under the framework of Prop. 106, the Arizona Secretary of State must use the IRC's congressional maps to conduct the congressional elections in 2012 and thereafter, until a new IRC is chosen in 2021. Ariz. Const. art. IV., pt. 2, § 1 (¶¶ 5, 17, and 23).

2012 Election Deadlines

30. The last day for candidates to file nomination petitions for the 2012 Primary Election was May 30, 2012. Ariz. Rev. Stat. § 16-311.

31. The Primary Election will be held on August 28, 2012. Early voting begins on August 2, 2012.

32. By law, the last day to transmit ballots to registered absent uniformed services voters and overseas voters is 45 days before the Primary Election, or July 14, 2012. Ariz. Rev. Stat. § 16-543.

CLAIM FOR RELIEF

33. Plaintiff adopts herein by reference all allegations of all preceding paragraphs.

34. An actual controversy exists within this Court's jurisdiction that would be resolved by a declaration of the rights and other legal relations of the parties in this action—namely, that Prop. 106 violates the Elections Clause of the United States Constitution.

35. The authority to prescribe the times, places, and manner of congressional elections arises exclusively under the Elections Clause of the United States Constitution. The States do not have the inherent authority to regulate federal elections.

36. The Constitution delegates and conveys the authority to prescribe the times, places, and manner of congressional elections only to "the Legislature" of "each state." U.S. Const. art. I, § 4, cl. 1. This delegation is a broad grant of power to the Legislature to prescribe the means by which congressional elections are held.

37. The word "Legislature" in the Elections Clause means the representative body which makes the laws of the people.

38. No State can constitutionally divest its Legislature entirely of the redistricting authority conveyed by Article I, Section 4.

39. Yet Prop. 106 removes entirely the constitutionally-delegated authority over prescribing the boundaries of congressional districts from the Arizona Legislature. In so doing, Prop. 106 conflicts directly with the United States Constitution and is therefore preempted, null and void.

40. Plaintiff is therefore entitled to judgment declaring that the provisions of Proposition 106 concerning congressional redistricting are null and void.

41. Plaintiff is therefore further entitled to judgment declaring that the congressional district maps adopted by the IRC are null and void.

42. Plaintiff is further entitled to a permanent injunction restraining adoption, implementation, or enforcement of any congressional district map created under Prop. 106, beginning the day after the 2012 general election.

RELIEF REQUESTED

The Legislature respectfully requests that the Court award it the following relief against all Defendants by:

A. Declaring that Proposition 106 violates the Elections Clause of the United States Constitution insofar as it removes the authority to prescribe the times, places, and manner of congressional elections from the Arizona Legislature, and therefore is preempted, null and void;

B. Declaring that the congressional district maps adopted by the IRC are unconstitutional and therefore null and void;

C. Enjoining Defendants and each of them permanently from adopting, implementing or enforcing any congressional map created under Proposition 106 beginning the day after the 2012 congressional election in Arizona, and

D. Awarding Plaintiff such other relief as is just, proper, or equitable under the facts and circumstances of this case.

DATED on July 20, 2012.

ARIZONA STATE LEGISLATURE

s/_____

EXHIBIT A

JOURNAL OF THE SENATE
Wednesday, May 2, 2012
One Hundred Fifteenth Day

The Senate session convened at 10:00 a.m. with President Pierce presiding.

Senator McComish offered prayer.

Pledge of Allegiance to the Flag was led by Senator Barto.

The following Senators answered on roll call:

PRESENT: Aboud, Allen, Antenori, Barto, Biggs, Burges, Cajero Bedford, Crandall, Gallardo, Gould, Gray, Griffin, Jackson, Landrum Taylor, Lewis, Lopez, McComish, Melvin, Meza, Reagan, Schapira, Shooter, Smith, Yarbrough, President Pierce—25

EXCUSED: Driggs, Klein, Lujan, Murphy, Nelson—5

Senator Lujan was seated at 11:21 a.m.

Senators Klein and Nelson were seated at 1:34 p.m.

Senator Murphy was seated at 1:37 p.m.

Senator Driggs was seated at 1:42 p.m.

JOURNAL

The President announced that without objection, reading of the Journal of Tuesday, May 1, 2012 was dispensed with and approved as recorded by the Secretary.

MESSAGES FROM THE HOUSE

President Pierce announced that without objection, Messages from the House as listed on the calendar would not be read. The messages would be entered in the Journal.

(May 1, 2012)
House concurred in Senate amendments and passed on Final Reading House Bills 2466 (60-0-0); 2713 (60-0-0); 2794 (58-2-0)

COMMITTEE OF THE WHOLE

Upon motion of Senator Biggs and agreed to, the Senate at 10:08 a.m. resolved itself into Committee of the Whole for consideration of the bill on the calendar with Senator Crandall in the chair.

Senator Biggs moved that during Committee of the Whole the debate be limited to no more than three minutes per Senator, speaking once per motion. The motion carried.

At 11:21 a.m., the Committee of the Whole was dissolved and Senator Crandall submitted the following recommendation:

House Bill 2571, do pass amended

Senator Crandall moved the report of the Committee of the Whole be adopted and the bill be properly assigned. The motion carried and House Bill 2571 was placed under Third Reading of Bills.

MESSAGES FROM THE HOUSE

President Pierce announced that without objection, Messages from the House as listed on the calendar would not be read. The messages would be entered in the Journal.

(May 2, 2012)
House acceded to the Senate request and appointed Free Conference Committees to the following:

Senate Bill 1442 – Members Mesnard, Farley, Vogt
Senate Bill 1449 – Members Montenegro, Farley, Quezada

RECESS

At 11:24 a.m. the Senate stood at recess subject to the sound of the gavel.

RECONVENE

The President called the Senate to order at 1:39 p.m.

MESSAGES FROM THE HOUSE

President Pierce announced that without objection, Messages from the House as listed on the calendar would not be read. The messages would be entered in the Journal.

(May 2, 2012)
House adopted the Conference Committee Report on Senate Bill 1153

House passed on Third Reading Senate Bill 1407 (58-0-2) amended

House concurred in Senate amendments and passed on Final Reading House Bill 2503 (38-20-2); House Concurrent Resolution 2004 (38-20-2)

MOTION TO AUTHORIZE PRESIDENT PIERCE AND SPEAKER TOBIN LITIGATION

Senator Biggs made the following motion:

Whereas, even though the Senate believes it is clear under the Senate Rules, the Arizona Constitution, and case law, that the President of the Senate is authorized to represent the entire body in various matters, including litigation, but nevertheless the Arizona Supreme Court in *Bennett v. Napolitano* did not recognize this authority;

Therefore, I move that the Senate, Fiftieth Legislature, join with the House to file suit, and join or intervene in any suit in both state and federal court to defend the authority of the Senate related to redistricting under the Constitutions of both the United States and the State of Arizona. To accomplish this purpose the Senate authorizes the President to represent the interests of the Senate and take all appropriate action, including the retention of outside counsel, on its behalf in any matter related to redistricting, including acting jointly with the Speaker of the House to act on behalf of the Legislature as a whole.

Senator Schapira requested a roll call vote. Request for a roll call vote was supported by Senator Landrum Taylor. The motion passed by the following vote:

AYES 21: Allen, Antenori, Barto, Biggs, Burges, Crandall, Driggs, Gould, Gray, Griffin, Klein, Lewis, McComish, Melvin, Murphy, Nelson, Reagan, Shooter, Smith, Yarbrough, President Pierce S

NOES 9: Aboud, Cajero Bedford, Gallardo, Jackson, Landrum Taylor, Lopez, Lujan, Meza, Schapira

THIRD READING OF BILLS

The following bill was read on Third Reading by number and title, passed on roll call and signed in open session:

House Bill 2571: An Act amending sections 3-107, 3-1003, 3-1003.02, 3-1211, 4-111, 4-112, 5-101.01, 5-105, 5-112, 5-224, 5-556, 5-604, 6-111, 6-112, 15-182, 15-203 and 15-543, ARS; repealing section 15-1331, ARS; amending sections 15-1626, 15-1852, 15-2002, 17-211, 17-231, 20-141, 20-148, 23-108, 23-108.02, 23-391, 23-406, 23-1501, 26-101, 26-102, 26-305, 27-122, 27-151, 28-363, 30-103, 30-108, 30-652, 31-401, 31-402, 32-106, 32-304, 32-503, 32-703, 32-802, 32-905, 32-1103, 32-1104, 32-1205, 32-1305, 32-1307, 32-1405, 32-1509, 32-1605.01, 32-1673, 32-1704, 32-1804, 32-1903, 32-1904, 32-2003, 32-2063, 32-2109, 32-2206, 32-2207, 32-2304, 32-2904, 32-2905, 32-3003, 32-3253, 32-3403, 32-3504, 32-3506, 32-3605, 32-3903, 32-3904, 35-196.01, 36-102, 36-103, 36-273, 36-446.03, 36-450.02, 36-1943, 36-2903.01, 36-2926, 37-132, 37-623.01, 37-1122, 38-401, 38-448, 38-532, 38-610.01, 38-610.02 and 38-611, ARS; amending title 38, chapter 4, article 1, ARS, by adding sections 38-611.01 and 38-611.02; amending sections 38-612, 38-654, 38-715, 38-848, 40-105, 40-108, 40-464, 41-121.02, 41-151.04, 41-151.05, 41-172, 41-192, 41-511.02, 41-511.05, 41-531, 41-542, 41-619.53 and 41-701, ARS; amending title 41, chapter 4, article 1, ARS, by adding sections 41-709, 41-710 and 41-711; amending title 41, chapter 4, ARS, by adding article 4; repealing title 41, chapter 4, article 5, ARS; amending title 41, chapter 4, ARS, by adding a new article 5; changing the designation of title 41, chapter 4, article 6, ARS, to "state personnel

board"; amending sections 41-781 and 41-782, ARS; repealing sections 41-783 and 41-784, ARS; transferring and renumbering section 41-785, ARS, for placement in title 41, chapter 4, article 6, as section 41-783; amending section 41-783, ARS, as transferred and renumbered by this act; repealing section 41-786, ARS; amending sections 41-821, 41-832, 41-902, 41-903, 41-941, 41-982, 41-1009, 41-1051, 41-1092.01, 41-1604, 41-1711, 41-1830.11, 41-1830.12 and 41-1830.13, ARS; repealing section 41-1830.14, ARS; amending section 41-1830.15, ARS; amending title 41, chapter 12, article 10, ARS, by adding section 41-1830.16; amending sections 41-1952, 41-1954, 41-2061, 41-2065, 41-2147, 41-2305, 41-2405, 41-2513, 41-2804, 41-2831, 41-3016.06, 41-3451, 41-3503, 41-3505, 41-3952, 41-4253, 41-4301, 41-4801, 42-1002, 42-1004, 42-1252, 42-16155, 45-104, 45-418, 49-103 and 49-1203, ARS; relating to the state personnel system.

AYES 21: Allen, Antenori, Barto, Biggs, Burges, Crandall, Driggs, Gould, Gray, Griffin, Klein, Lewis, McComish, Melvin, Murphy, Nelson, Reagan, Shooter, Smith, Yarbrough, President Pierce S

NOES 9: Aboud, Cajero Bedford, Gallardo, Jackson, Landrum Taylor, Lopez, Lujan, Meza, Schapira

ORDER OF BUSINESS

The President announced that without objection, the Senate would revert to the Order of Business, Committee of the Whole

COMMITTEE OF THE WHOLE

Upon motion of Senator Biggs and agreed to, the Senate at 2:33 p.m. resolved itself into Committee of the Whole for consideration of bills on the calendar with Senator Gray in the chair.

Senator Biggs moved that during Committee of the Whole the debate be limited to no more than three minutes per Senator, speaking once per motion. The motion carried.

At 2:55 p.m., the Committee of the Whole was dissolved and Senator Gray submitted the following recommendations:

House Bill 2745, do pass amended
House Concurrent Resolution 2060, do pass

Senator Gray moved the report of the Committee of the Whole be adopted and the bills be properly assigned. The motion carried and the bills reported do pass and do pass amended were placed under Third Reading of Bills.

CONFERENCE COMMITTEE REPORTS

Senator Biggs moved on behalf of the Chairman that the Senate adopt the following conference committee report:

> Senators Biggs, McComish and Meza, Senate conferees, and Representatives Ugenti, Dial and Tovar, House conferees, submitted the following conference report on Senate Bill 1153:
>
> That the Senate accept the House amendments with exceptions and the bill be further amended.

The motion carried and the Secretary notified the House.

FINAL READING OF BILLS

The following bill was read on Final Reading by number and title, passed on roll call and signed in open session:

Senate Bill 1153: An Act amending section 28-2166, ARS; relating to vehicle rental liability.

AYES 29: Allen, Antenori, Barto, Biggs, Burges, Cajero Bedford, Crandall, Driggs, Gallardo, Gould, Gray, Griffin, Jackson, Klein, Landrum Taylor, Lewis, Lopez, Lujan, McComish, Melvin, Meza, Murphy, Nelson, Reagan, Schapira, Shooter, Smith, Yarbrough, President Pierce S

NOES 1: Aboud

RECESS

At 3:04 p.m. the Senate stood at recess subject to the sound of the gavel.

RECONVENE

The President called the Senate to order at 3:26 p.m.

THIRD READING OF BILLS

The following bill was read on Third Reading by number and title, passed on roll call and signed in open session:

House Bill 2745: An Act amending sections 38-711, 38-714, 38-715 and 38-718, ARS; repealing section 38-719, ARS; amending sections 38-721, 38-740, 38-743, 38-744, 38-745 and 38-760, ARS; providing for the delayed repeal of section 38-761, ARS; amending sections 38-762, 38-783, 38-797.07 and 38-843.05, ARS; making an appropriation; relating to retirement systems.

AYES 30: Aboud, Allen, Antenori, Barto, Biggs, Burges, Cajero Bedford, Crandall, Driggs, Gallardo, Gould, Gray, Griffin, Jackson, Klein, Landrum Taylor, Lewis, Lopez, Lujan, McComish, Melvin, Meza, Murphy, Nelson, Reagan, Schapira, Shooter, Smith, Yarbrough, President Pierce S

CONCURRENCE OF BILLS

Senator Biggs moved that the Senate concur in the House amendments to Senate Bill 1407. The motion carried.

The bill was placed under Final Reading of Bills.

FINAL READING OF BILLS

The following bill was read on Final Reading by number and title, passed on roll call and signed in open session:

Senate Bill 1407: An Act amending sections 48-261, 48-262, 48-266, 48-851 and 48-853 ARS; relating to fire districts.

AYES 29: Aboud, Allen, Antenori, Barto, Biggs, Burges, Cajero Bedford, Crandall, Driggs, Gallardo, Gray, Griffin, Jackson, Klein, Landrum Taylor, Lewis, Lopez, Lujan, McComish, Melvin, Meza, Murphy, Nelson, Reagan, Schapira, Shooter, Smith, Yarbrough, President Pierce S

NOES 1: Gould

OTHER BUSINESS OF THE SENATE

EXECUTIVE CONFIRMATIONS

President Pierce announced that a group motion would be made for the confirmations unless a Senator requested a nomination to be considered separately.

The Committee on Commerce and Energy, Senator Melvin, Chairman, having had under consideration the matter of the Governor's appointment of Terry R. Gleeson as a member of the Board of Manufactured Housing for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Commerce and Energy, Senator Melvin, Chairman, having had under consideration the matter of the Governor's appointment of Sharon L. Henry as a member of the Arizona Sports and Tourism Authority for the term of office expiring July 1, 2014 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Commerce and Energy, Senator Melvin, Chairman, having had under consideration the matter of the Governor's appointment of Zeek Ojeh as a member of the Board of Manufactured Housing for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Commerce and Energy, Senator Melvin, Chairman, having had under consideration the matter of the Governor's appointment of Nicholas P Scutari as a member of the Arizona State Lottery Commission for the term of office expiring January 16, 2017 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Eldon E. Hastings as

a member of the Commission for Postsecondary Education for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Todd A. Juhl as a member of the State Board for Charter Schools for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Patricia J. Leonard as a member of the State Board for Private Postsecondary Education for the term of office expiring January 15, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Jason D. Pistillo as a member of the State Board for Private Postsecondary Education for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Kathleen Player as a member of the Commission for Postsecondary Education for the term of office expiring January 21,

2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Kathryn L. Senseman as a member of the State Board for Charter Schools for the term of office expiring January 20, 2014 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Education, Senator Crandall, Chairman, having had under consideration the matter of the Governor's appointment of Jeffrey J. Smith as a member of the School Facilities Board for the term of office expiring January 18, 2016 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of Thomas J. Connelly as a member of the Arizona State Retirement System Board for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of William C. Davis as a member of the Public Safety Personnel Retirement System Board of Trustees for the term of office expiring January 16, 2017 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of Derrick R.E. Doba as a member of the State Board of Tax Appeals for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of Gregory S. Ferguson as a member of the Public Safety Personnel Retirement System Board of Trustees for the term of office expiring January 16, 2017 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of Steven R. Matthews as a member of the Family College Savings Program Oversight Committee for the term of office expiring January 18, 2016 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Finance, Senator Yarbrough, Chairman, having had under consideration the matter of the Governor's appointment of Michael J. Smarik as a member of the Arizona State Retirement System Board for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Government Reform, Senator Murphy, Chairman, having had under consideration the matter of the Governor's appointment of Patrick J. Quinn as a member of the State Personnel Board for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Government Reform, Senator Murphy, Chairman, having had under consideration the matter of the Governor's appointment of James V Thompson as a member of the State Personnel Board for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Healthcare and Medical Liability Reform, Senator Barto, Chairman, having had under consideration the matter of the Governor's appointment of James M. Gillard as a member of the Arizona Medical Board for the term of office expiring July 1, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Healthcare and Medical Liability Reform, Senator Barto, Chairman, having had under consideration the matter of the Governor's appointment of Harold Magalnick as a member of the Arizona Medical Board for the term of office expiring July 1, 2012 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Judiciary, Senator Gould, Chairman, having had under consideration the matter of the Governor's appointment of Charles A. Brown III as a member of the Commission on Trial Court Appointments, Maricopa County for the term of office expiring January 20, 2014 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Judiciary, Senator Gould, Chairman, having had under consideration the matter of the Governor's appointment of Nicholas Basil Simonetta as a member of the Urban Land Planning Oversight Committee for the term of office expiring January 18, 2016 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of James V Christensen as a member of the Arizona State Veterinary Medical Examining Board for the term of office expiring January 19, 2015 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of Janet Kay Daggett as a member of the Arizona State Parks Board for the term of office

expiring January 15, 2018 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of Rory S. Goree as a member of the Arizona Racing Commission for the term of office expiring January 16, 2017 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of Donald R. Johnson as a member of the Arizona Game and Fish Commission Appointment Recommendation Board for the term of office expiring July 29, 2014 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Natural Resources and Transportation, Senator Nelson, Chairman, having had under consideration the matter of the Governor's appointment of Joseph E. La Rue as a member of the State Transportation Board for the term of office expiring January 15, 2018 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Committee on Veterans, Military and Government Affairs, Senator Driggs, Chairman, having had under consideration the matter of the

Governor's appointment of Richard A. Kochanski as a member of the State Fire Safety Committee for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Veterans, Military and Government Affairs, Senator Driggs, Chairman, having had under consideration the matter of the Governor's appointment of Russell H. Louman as a member of the State Fire Safety Committee for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Veterans, Military and Government Affairs, Senator Driggs, Chairman, having had under consideration the matter of the Governor's appointment of Patrick N. Moore as a member of the State Fire Safety Committee for the term of office expiring January 20, 2014 submitted the following report: Your Committee recommends to the Senate the confirmation.

The Committee on Veterans, Military and Government Affairs, Senator Driggs, Chairman, having had under consideration the matter of the Governor's appointment of Rick Alan Southey as a member of the State Fire Safety Committee for the term of office expiring January 21, 2013 submitted the following report: Your Committee recommends to the Senate the confirmation.

The President asked if the Senate would advise and consent to the nominations and it was agreed to.

The Secretary notified the Governor and the Secretary of State of the confirmations.

CONFERENCE COMMITTEE REPORTS

Senator Biggs moved on behalf of the Chairman that the Senate adopt the following conference committee report:

> Senators Gray, Lopez and Yarbrough, Senate conferees, and Representatives Harper, Meyer and Yee, House conferees, submitted the following corrected conference report on House Bill 2093:
>
> That the House accept the Senate amendments with exceptions and the bill be further amended.

The motion carried and the Secretary recorded the action and notified the House.

RECESS

At 3:48 p.m. the Senate stood at recess subject to the sound of the gavel.

RECONVENE

President Pro Tempore Allen assumed the chair and called the Senate to order at 4:46 p.m.

ADJOURNMENT

Upon motion of Senator Biggs and agreed to, the Senate adjourned at 4:46 p.m. until Thursday, May 3, 2012 at 10:00 a.m.

SYLVIA ALLEN
President Pro Tempore of the Senate

ATTEST:

CHARMION BILLINGTON
Secretary of the Senate

JOURNAL OF THE HOUSE
Wednesday, May 2, 2012
One Hundred Fifteenth Day

The session scheduled to convene at 10:00 a.m. was called to order at 10:40 a.m., Speaker Andrew M. Tobin presiding.

Attendance roll call was as follows:

PRESENT: Alston, Arredondo, Ash, Barton, Campbell, Chabin, Court, Crandell, Dial, Fann, Farley, Farnsworth, Fillmore, Fontana, Forese, Gallego, Gonzales, Goodale, Gowan, Gray R, Hale, Harper, Heinz, Hobbs, Jones, Judd, Kavanagh, Lesko, Lovas, McLain, Meyer, Miranda C, Montenegro, Olson, Pancrazi, Pierce, Pratt, Quezada, Reeve, Robson, Saldate, Seel, Smith D, Stevens, Tovar, Urie, Vogt, Weiers Jerry P, Wheeler, Williams, Yee, Speaker Tobin–52

ABSENT: Mesnard, Ugenti, Weiers Jim–3

EXCUSED: Ableser, Brophy McGee, Carter, McCune Davis, Proud–5

Members Ableser, Brophy McGee, Carter, McCune Davis and Proud were excused on personal business.

Members McCune Davis and Mesnard were seated at 11:15 a.m. Mrs. Ugenti was seated at 11:19 a.m. Mr. Jim Weiers was seated at 11:48 a.m. Mrs. Carter was seated at 11:50 a.m. Mrs. Brophy McGee was seated at 11:51 a.m.

Prayer was offered by Member Tom Forese.

The Pledge of Allegiance to the Flag was led by Member John Fillmore.

Without objection the reading of the Journal of Tuesday, May 1S, 2012, was dispensed with and approved as written.

PERSONAL PRIVILEGE

Mrs. Yee expressed appreciation to staff, members and leadership of the House.

REPORTS OF SELECT COMMITTEES

The Free Conference Committee on Senate Bill 1153 reported:

> That the Senate accept the House amendments with exceptions and the bill be further amended.

HOUSE CONFEREES:	SENATE CONFEREES:
Michelle Ugenti	Andy Biggs
Jeff Dial	John McComish
Anna Tovay	Robert Meza

Motion by Mr. Court that the House adopt the Conference Committee Report on Senate Bill 1153. Carried.

BUSINESS ON THE SPEAKER'S DESK

Certificates of appreciation were presented to the following House pages:

Daniel Briggin	Kyle Briggin	Tara Chapman
Carissa Cortez	Rose Estes	Daniel Frank
Samantha Franklin	William Fry	Anadela Hogan
Bethany Hunter	Frank (Taylor) Larson	Esther Linkey
Adrian Luth	Brendan Melander	Megan O'Brien
Micah Palich	Devon Romo	Ben Scheel
Jessica Sornsin	Charissa Wright	

Certificates of appreciation were presented to the following House interns:

Christopher Adams	Alexis Burkhart	Virginia Carico
Patrick Devine	Thomas Drogaris	Yijee Jeong
Bethan Jones	Tom Kwon	Traci Long
Stuart Luther	Kate Sommerville	
Chelsea Rubin	Casaundra Wallace	Katherine Adler
Elizabeth Bixby	Daniel Dominguez	Brian Holly
Lourdes Pena	Kimberley Pope	Tameka Spence
Nathan Wade	Krystle Fernandez	Paul Gales
Ryan McCarthy	Kyle LaRose	

UNFINISHED BUSINESS

Motion by Mr. Mesnard that the House accede to the Senate request and appoint a Free Conference Committee to consider the disagreement on House amendments to Senate Bill 1442. Carried, and Speaker Tobin appointed Members Mesnard, Farley and Vogt

Motion by Mr. Harper that the House accede to the Senate request and appoint a Free Conference Committee to consider the disagreement on House amendments to Senate Bill 1449. Carried, and Speaker Tobin appointed Members Montenegro, Farnsworth and Quezada

BUSINESS ON THE SPEAKER'S DESK

Motion by Mr. Farnsworth that, whereas, even though the House of Representatives believes it is clear under the House Rules, the Arizona Constitution, and case law, that the Speaker of the House of Representatives is authorized to represent the entire body in various matters, including litigation, but nevertheless the Arizona Supreme Court in Bennett v. Napolitano did not recognize this authority; therefore, I move that the House of Representatives, Fiftieth Legislature, join with the Senate to file suit, and join or intervene in any suit in both state and federal court to defend the authority of the House related to redistricting under the Constitutions of both the United States and of the State of Arizona. To accomplish this purpose the House authorizes the Speaker to represent the interests of the House of Representatives and take all appropriate action, including the retention of outside counsel, on its behalf in any matter related to redistricting, including acting jointly with the Senate President to act on behalf of the Legislature as a whole. Carried.

Speaker Tobin announced pursuant to House Rule 17E, that permission was granted for conference committees to meet through today, May 2, 2012.

THIRD READING OF BILLS

The following bills were read the third time by number and title, passed on roll call vote and signed in open session by Speaker Tobin:

Senate Bill 1407: An Act amending sections 48-261, 48-262, 48-266, 48-851 and 48-853 ARS; relating to fire districts.

AYES 58: Alston, Arredondo, Ash, Barton, Brophy Mcgee, Campbell, Carter, Chabin, Court, Crandell, Dial, Fann, Farley, Farnsworth, Fillmore, Fontana, Forese, Gallego, Gonzales, Goodale, Gowan, Gray R, Hale, Harper, Heinz, Hobbs, Jones, Judd, Kavanagh, Lesko, Lovas, McCune Davis, McLain, Mesnard, Meyer, Miranda C, Montenegro, Olson, Pancrazi, Pierce, Pratt, Quezada, Reeve, Robson, Saldate, Seel, Smith D, Stevens, Tovar, Ugenti, Urie, Vogt, Weiers J, Weiers Jp, Wheeler, Williams, Yee, Speaker Tobin

NOT VOTING 2: Ableser, Proud

UNFINISHED BUSINESS

Motion by Mrs. Yee that the House concur in the Senate amendments to House Bill 2503. Carried.

FINAL PASSAGE

The following bill, as amended by the Senate, was read the final time by number and title, passed on roll call vote and signed in open session by Speaker Tobin:

House Bill 2503: An Act amending title 12, chapter 6, article 9, ARS, by adding section 12-689; relating to product liability.

AYES 38: Barton, Brophy Mcgee, Carter, Chabin, Court, Crandell, Dial, Fann, Farnsworth, Fillmore, Forese, Goodale, Gowan, Gray R, Harper, Jones, Judd, Kavanagh, Lesko, Lovas, McLain, Mesnard, Montenegro, Olson, Pierce, Pratt, Reeve, Robson, Seel, Stevens, Ugenti, Urie, Vogt, Weiers J, Weiers Jp, Williams, Yee, Speaker Tobin

NAYS 20: Alston, Arredondo, Ash, Campbell, Farley, Fontana, Gallego, Gonzales, Hale, Heinz, Hobbs, McCune Davis, Meyer, Miranda C, Pancrazi, Quezada, Saldate, Smith D, Tovar, Wheeler

NOT VOTING 2: Ableser, Proud

UNFINISHED BUSINESS

Motion by Mr. Crandell that the House concur in the Senate amendments to House Concurrent Resolution 2004. Carried.

FINAL PASSAGE

The following bill, as amended by the Senate, was read the final time by number and title, passed on roll call vote and signed in open session by Speaker Tobin:

House Concurrent Resolution 2004: A Concurrent Resolution proposing an amendment to the Constitution of Arizona; amending the Constitution of Arizona by adding article II.I; amending article XX, paragraphs 4 and 12, Constitution of Arizona; relating to state sovereignty.

AYES 38: Ash, Barton, Brophy Mcgee, Carter, Court, Crandell, Dial, Fann, Farnsworth, Fillmore, Forese, Goodale, Gowan, Gray R, Harper, Jones, Judd, Kavanagh, Lesko, Lovas, McLain, Mesnard, Montenegro, Olson, Pierce, Pratt, Robson, Seel, Smith D, Stevens, Ugenti, Urie, Vogt, Weiers J, Weiers Jp, Williams, Yee, Speaker Tobin

NAYS 20: Alston, Arredondo, Campbell, Chabin, Farley, Fontana, Gallego, Gonzales, Hale, Heinz, Hobbs, McCune Davis, Meyer, Miranda C,

Pancrazi, Quezada, Reeve, Saldate, Tovar, Wheeler

NOT VOTING 2: Ableser, Proud

Motion by Mr. Court that the House stand at recess subject to the sound of the gavel. Carried at 12:45 p.m.

Speaker Tobin called the House to order at 3:54 p.m.

BILLS AND OTHER BUSINESS
FROM THE SENATE

HB 2571, passed amended, 21-9-0
SB 1153, passed on Final Passage, 29-1-0

Motion by Mr. Court that the House stand adjourned until 10:00 a.m., Thursday, May 3, 2012. Carried at 3:55 p.m.

ANDREW M. TOBIN
Speaker of the House

ATTEST:

CHERYL LAUBE
Chief Clerk of the House

Proposition 106 2000 Ballot Propositions

General Election November 7, 2000

Spelling, grammar, and punctuation were reproduced as submitted in the "for" and "against" arguments.

PROPOSITION 106

OFFICIAL TITLE

AN INITIATIVE MEASURE

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE IV. PART 2, SECTION 1, CONSTITUTION OF ARIZONA; RELATING TO ENDING THE PRACTICE OF GERRYMANDERING AND IMPROVING VOTER AND CANDIDATE PARTICIPATION IN ELECTIONS BY CREATING AN INDEPENDENT COMMISSION OF BALANCED APPOINTMENTS TO OVERSEE THE MAPPING OF FAIR AND COMPETITIVE CONGRESSIONAL AND LEGISLATIVE DISTRICTS.

TEXT OF PROPOSED AMENDMENT

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ARIZONA:

ARTICLE IV, PART 2, SECTION 1, CONSTITUTION OF ARIZONA, IS AMENDED AS FOLLOWS IF APPROVED BY THE VOTERS AND UPON PROCLAMATION BY THE GOVERNOR:

1. Senate; house of representatives; members; special session upon petition of members; CONGRESSIONAL AND LEGISLATIVE BOUNDARIES; CITIZEN COMMISSIONS

Section 1. (1) The senate shall be composed of one member elected from each of the thirty legislative

districts established ~~by the legislature~~ PURSUANT TO THIS SECTION.

The house of representatives shall be composed of two members elected from each of the thirty legislative districts established ~~by the legislature~~ PURSUANT TO THIS SECTION.

(2) Upon the presentation to the governor of a petition bearing the signatures of not less than two-thirds of the members of each house, requesting ~~that he call~~ a special session of the legislature and designating the date of convening, the governor shall ~~forthwith~~ PROMPTLY call a special session to assemble on the date specified. At a special session so called the subjects which may be considered by the legislature shall not be limited.

(3) BY FEBRUARY 28 OF EACH YEAR THAT ENDS IN ONE, AN INDEPENDENT REDISTRICTING COMMISSION SHALL BE ESTABLISHED TO PROVIDE FOR THE REDISTRICTING OF CONGRESSIONAL AND STATE LEGISLATIVE DISTRICTS. THE INDEPENDENT REDISTRICTING COMMISSION SHALL CONSIST OF FIVE MEMBERS. NO MORE THAN TWO MEMBERS OF THE INDEPENDENT REDISTRICTING COMMISSION SHALL BE MEMBERS OF THE SAME POLITICAL PARTY. OF THE FIRST FOUR MEMBERS APPOINTED, NO MORE THAN TWO SHALL RESIDE IN THE SAME COUNTY. EACH MEMBER SHALL BE A REGISTERED ARIZONA VOTER WHO HAS BEEN CONTINUOUSLY REGISTERED WITH THE SAME POLITICAL PARTY OR REGISTERED AS UNAFFILIATED WITH A POLITICAL PARTY FOR

THREE OR MORE YEARS IMMEDIATELY PRECEDING APPOINTMENT, WHO IS COMMITTED TO APPLYING THE PROVISIONS OF THIS SECTION IN AN HONEST, INDEPENDENT AND IMPARTIAL FASHION AND TO UPHOLDING PUBLIC CONFIDENCE IN THE INTEGRITY OF THE REDISTRICTING PROCESS. WITHIN THE THREE YEARS PREVIOUS TO APPOINTMENT, MEMBERS SHALL NOT HAVE BEEN APPOINTED TO, ELECTED TO, OR A CANDIDATE FOR ANY OTHER PUBLIC OFFICE, INCLUDING PRECINCT COMMITTEEMAN OR COMMITTEEWOMAN BUT NOT INCLUDING SCHOOL BOARD MEMBER OR OFFICER, AND SHALL NOT HAVE SERVED AS AN OFFICER OF A POLITICAL PARTY, OR SERVED AS A REGISTERED PAID LOBBYIST OR AS AN OFFICER OF A CANDIDATE'S CAMPAIGN COMMITTEE.

(4) THE COMMISSION ON APPELLATE COURT APPOINTMENTS SHALL NOMINATE CANDIDATES FOR APPOINTMENT TO THE INDEPENDENT REDISTRICTING COMMISSION, EXCEPT THAT, IF A POLITICALLY BALANCED COMMISSION EXISTS WHOSE MEMBERS ARE NOMINATED BY THE COMMISSION ON APPELLATE COURT APPOINTMENTS AND WHOSE REGULAR DUTIES RELATE TO THE ELECTIVE PROCESS, THE COMMISSION ON APPELLATE COURT APPOINTMENTS MAY DELEGATE TO SUCH EXISTING COMMISSION (HEREINAFTER CALLED THE COMMISSION ON APPELLATE COURT APPOINTMENTS' DESIGNEE) THE DUTY OF NOMINATING MEMBERS FOR THE INDEPENDENT

REDISTRICTING COMMISSION, AND ALL OTHER DUTIES ASSIGNED TO THE COMMISSION ON APPELLATE COURT APPOINTMENTS IN THIS SECTION.

(5) BY JANUARY 8 OF YEARS ENDING IN ONE, THE COMMISSION ON APPELLATE COURT APPOINTMENTS OR ITS DESIGNEE SHALL ESTABLISH A POOL OF PERSONS WHO ARE WILLING TO SERVE ON AND ARE QUALIFIED FOR APPOINTMENT TO THE INDEPENDENT REDISTRICTING COMMISSION. THE POOL OF CANDIDATES SHALL CONSIST OF TWENTY-FIVE NOMINEES, WITH TEN NOMINEES FROM EACH OF THE TWO LARGEST POLITICAL PARTIES IN ARIZONA BASED ON PARTY REGISTRATION, AND FIVE WHO ARE NOT REGISTERED WITH EITHER OF THE TWO LARGEST POLITICAL PARTIES IN ARIZONA.

(6) APPOINTMENTS TO THE INDEPENDENT REDISTRICTING COMMISSION SHALL BE MADE IN THE ORDER SET FORTH BELOW NO LATER THAN JANUARY 31 OF YEARS ENDING IN ONE, THE HIGHEST RANKING OFFICER ELECTED BY THE ARIZONA HOUSE OF REPRESENTATIVES SHALL MAKE ONE APPOINTMENT TO THE INDEPENDENT REDISTRICTING COMMISSION FROM THE POOL OF NOMINEES, FOLLOWED BY ONE APPOINTMENT FROM THE POOL MADE IN TURN BY EACH OF THE FOLLOWING: THE MINORITY PARTY LEADER OF THE ARIZONA HOUSE OF REPRESENTATIVES, THE HIGHEST RANKING OFFICER ELECTED BY THE ARIZONA SENATE, AND THE MINORITY PARTY LEADER

OF THE ARIZONA SENATE. EACH SUCH OFFICIAL SHALL HAVE A SEVEN-DAY PERIOD IN WHICH TO MAKE AN APPOINTMENT. ANY OFFICIAL WHO FAILS TO MAKE AN APPOINTMENT WITHIN THE SPECIFIED TIME PERIOD WILL FORFEIT THE APPOINTMENT PRIVILEGE. IN THE EVENT THAT THERE ARE TWO OR MORE MINORITY PARTIES WITHIN THE HOUSE OR THE SENATE, THE LEADER OF THE LARGEST MINORITY PARTY BY STATEWIDE PARTY REGISTRATION SHALL MAKE THE APPOINTMENT.

(7) ANY VACANCY IN THE ABOVE FOUR INDEPENDENT REDISTRICTING COMMISSION POSITIONS REMAINING AS OF MARCH 1 OF A YEAR ENDING IN ONE SHALL BE FILLED FROM THE POOL OF NOMINEES BY THE COMMISSION ON APPELLATE COURT APPOINTMENTS OR ITS DESIGNEE. THE APPOINTING BODY SHALL STRIVE FOR POLITICAL BALANCE AND FAIRNESS.

(8) AT A MEETING CALLED BY THE SECRETARY OF STATE, THE FOUR INDEPENDENT REDISTRICTING COMMISSION MEMBERS SHALL SELECT BY MAJORITY VOTE FROM THE NOMINATION POOL A FIFTH MEMBER WHO SHALL NOT BE REGISTERED WITH ANY PARTY ALREADY REPRESENTED ON THE INDEPENDENT REDISTRICTING COMMISSION AND WHO SHALL SERVE AS CHAIR. IF THE FOUR COMMISSIONERS FAIL TO APPOINT A FIFTH MEMBER WITHIN FIFTEEN DAYS, THE COMMISSION ON APPELLATE

COURT APPOINTMENTS OR ITS DESIGNEE, STRIVING FOR POLITICAL BALANCE AND FAIRNESS, SHALL APPOINT A FIFTH MEMBER FROM THE NOMINATION POOL, WHO SHALL SERVE AS CHAIR.

(9) THE FIVE COMMISSIONERS SHALL THEN SELECT BY MAJORITY VOTE ONE OF THEIR MEMBERS TO SERVE AS VICECHAIR.

(10) AFTER HAVING BEEN SERVED WRITTEN NOTICE AND PROVIDED WITH AN OPPORTUNITY FOR A RESPONSE, A MEMBER OF THE INDEPENDENT REDISTRICTING COMMISSION MAY BE REMOVED BY THE GOVERNOR, WITH THE CONCURRENCE OF TWO-THIRDS OF THE SENATE, FOR SUBSTANTIAL NEGLECT OF DUTY, GROSS MISCONDUCT IN OFFICE, OR INABILITY TO DISCHARGE THE DUTIES OF OFFICE.

(11) IF A COMMISSIONER OR CHAIR DOES NOT COMPLETE THE TERM OF OFFICE FOR ANY REASON, THE COMMISSION ON APPELLATE COURT APPOINTMENTS OR ITS DESIGNEE SHALL NOMINATE A POOL OF THREE CANDIDATES WITHIN THE FIRST THIRTY DAYS AFTER THE VACANCY OCCURS. THE NOMINEES SHALL BE OF THE SAME POLITICAL PARTY OR STATUS AS WAS THE MEMBER WHO VACATED THE OFFICE AT THE TIME OF HIS OR HER APPOINTMENT, AND THE APPOINTMENT OTHER THAN THE CHAIR SHALL BE MADE BY THE CURRENT HOLDER OF THE OFFICE DESIGNATED TO MAKE THE ORIGINAL APPOINTMENT. THE APPOINTMENT OF A NEW

CHAIR SHALL BE MADE BY THE REMAINING COMMISSIONERS. IF THE APPOINTMENT OF A REPLACEMENT COMMISSIONER OR CHAIR IS NOT MADE WITHIN FOURTEEN DAYS FOLLOWING THE PRESENTATION OF THE NOMINEES, THE COMMISSION ON APPELLATE COURT APPOINTMENTS OR ITS DESIGNEE SHALL MAKE THE APPOINTMENT, STRIVING FOR POLITICAL BALANCE AND FAIRNESS. THE NEWLY APPOINTED COMMISSIONER SHALL SERVE OUT THE REMAINDER OF THE ORIGINAL TERM.

(12) THREE COMMISSIONERS, INCLUDING THE CHAIR OR VICE-CHAIR, CONSTITUTE A QUORUM. THREE OR MORE AFFIRMATIVE VOTES ARE REQUIRED FOR ANY OFFICIAL ACTION. WHERE A QUORUM IS PRESENT, THE INDEPENDENT REDISTRICTING COMMISSION SHALL CONDUCT BUSINESS IN MEETINGS OPEN TO THE PUBLIC, WITH 48 OR MORE HOURS PUBLIC NOTICE PROVIDED.

(13) A COMMISSIONER, DURING THE COMMISSIONER'S TERM OF OFFICE AND FOR THREE YEARS THEREAFTER, SHALL BE INELIGIBLE FOR ARIZONA PUBLIC OFFICE OR FOR REGISTRATION AS A PAID LOBBYIST.

(14) THE INDEPENDENT REDISTRICTING COMMISSION SHALL ESTABLISH CONGRESSIONAL AND LEGISLATIVE DISTRICTS. THE COMMENCEMENT OF THE MAPPING PROCESS FOR BOTH THE CONGRESSIONAL AND LEGISLATIVE DISTRICTS SHALL BE THE CREATION OF

DISTRICTS OF EQUAL POPULATION IN A GRID-LIKE PATTERN ACROSS THE STATE. ADJUSTMENTS TO THE GRID SHALL THEN BE MADE AS NECESSARY TO ACCOMMODATE THE GOALS AS SET FORTH BELOW:

A. DISTRICTS SHALL COMPLY WITH THE UNITED STATES CONSTITUTION AND THE UNITED STATES VOTING RIGHTS ACT;

B. CONGRESSIONAL DISTRICTS SHALL HAVE EQUAL POPULATION TO THE EXTENT PRACTICABLE, AND STATE LEGISLATIVE DISTRICTS SHALL HAVE EQUAL POPULATION TO THE EXTENT PRACTICABLE;

C. DISTRICTS SHALL BE GEOGRAPHICALLY COMPACT AND CONTIGUOUS TO THE EXTENT PRACTICABLE;

D. DISTRICT BOUNDARIES SHALL RESPECT COMMUNITIES OF INTEREST TO THE EXTENT PRACTICABLE;

E. TO THE EXTENT PRACTICABLE, DISTRICT LINES SHALL USE VISIBLE GEOGRAPHIC FEATURES, CITY, TOWN AND COUNTY BOUNDARIES, AND UNDIVIDED CENSUS TRACTS;

F. TO THE EXTENT PRACTICABLE, COMPETITIVE DISTRICTS SHOULD BE FAVORED WHERE TO DO SO WOULD CREATE NO SIGNIFICANT DETRIMENT TO THE OTHER GOALS.

(15) PARTY REGISTRATION AND VOTING HISTORY DATA SHALL BE EXCLUDED FROM THE INITIAL PHASE OF THE MAPPING PROCESS

BUT MAY BE USED TO TEST MAPS FOR COMPLIANCE WITH THE ABOVE GOALS. THE PLACES OF RESIDENCE OF INCUMBENTS OR CANDIDATES SHALL NOT BE IDENTIFIED OR CONSIDERED.

(16) THE INDEPENDENT REDISTRICTING COMMISSION SHALL ADVERTISE A DRAFT MAP OF CONGRESSIONAL DISTRICTS AND A DRAFT MAP OF LEGISLATIVE DISTRICTS TO THE PUBLIC FOR COMMENT, WHICH COMMENT SHALL BE TAKEN FOR AT LEAST THIRTY DAYS. EITHER OR BOTH BODIES OF THE LEGISLATURE MAY ACT WITHIN THIS PERIOD TO MAKE RECOMMENDATIONS TO THE INDEPENDENT REDISTRICTING COMMISSION BY MEMORIAL OR BY MINORITY REPORT, WHICH RECOMMENDATIONS SHALL BE CONSIDERED BY THE INDEPENDENT REDISTRICTING COMMISSION. THE INDEPENDENT REDISTRICTING COMMISSION SHALL THEN ESTABLISH FINAL DISTRICT BOUNDARIES.

(17) THE PROVISIONS REGARDING THIS SECTION ARE SELF-EXECUTING. THE INDEPENDENT REDISTRICTING COMMISSION SHALL CERTIFY TO THE SECRETARY OF STATE THE ESTABLISHMENT OF CONGRESSIONAL AND LEGISLATIVE DISTRICTS.

(18) UPON APPROVAL OF THIS AMENDMENT, THE DEPARTMENT OF ADMINISTRATION OR ITS SUCCESSOR SHALL MAKE ADEQUATE OFFICE SPACE AVAILABLE FOR THE INDEPENDENT REDISTRICTING

COMMISSION. THE TREASURER OF THE STATE SHALL MAKE $6,000,000 AVAILABLE FOR THE WORK OF THE INDEPENDENT REDISTRICTING COMMISSION PURSUANT TO THE YEAR 2000 CENSUS. UNUSED MONIES SHALL BE RETURNED TO THE STATE'S GENERAL FUND. IN YEARS ENDING IN EIGHT OR NINE AFTER THE YEAR 2001, THE DEPARTMENT OF ADMINISTRATION OR ITS SUCCESSOR SHALL SUBMIT TO THE LEGISLATURE A RECOMMENDATION FOR AN APPROPRIATION FOR ADEQUATE REDISTRICTING EXPENSES AND SHALL MAKE AVAILABLE ADEQUATE OFFICE SPACE FOR THE OPERATION OF THE INDEPENDENT REDISTRICTING COMMISSION. THE LEGISLATURE SHALL MAKE THE NECESSARY APPROPRIATIONS BY A MAJORITY VOTE.

(19) THE INDEPENDENT REDISTRICTING COMMISSION, WITH FISCAL OVERSIGHT FROM THE DEPARTMENT OF ADMINISTRATION OR ITS SUCCESSOR, SHALL HAVE PROCUREMENT AND CONTRACTING AUTHORITY AND MAY HIRE STAFF AND CONSULTANTS FOR THE PURPOSES OF THIS SECTION, INCLUDING LEGAL REPRESENTATION.

(20) THE INDEPENDENT REDISTRICTING COMMISSION SHALL HAVE STANDING IN LEGAL ACTIONS REGARDING THE REDISTRICTING PLAN AND THE ADEQUACY OF RESOURCES PROVIDED FOR THE OPERATION OF THE INDEPENDENT REDISTRICTING COMMISSION. THE INDEPENDENT

REDISTRICTING COMMISSION SHALL HAVE SOLE AUTHORITY TO DETERMINE WHETHER THE ARIZONA ATTORNEY GENERAL OR COUNSEL HIRED OR SELECTED BY THE INDEPENDENT REDISTRICTING COMMISSION SHALL REPRESENT THE PEOPLE OF ARIZONA IN THE LEGAL DEFENSE OF A REDISTRICTING PLAN.

(21) MEMBERS OF THE INDEPENDENT REDISTRICTING COMMISSION ARE ELIGIBLE FOR REIMBURSEMENT OF EXPENSES PURSUANT TO LAW, AND A MEMBER'S RESIDENCE IS DEEMED TO BE THE MEMBER'S POST OF DUTY FOR PURPOSES OF REIMBURSEMENT OF EXPENSES.

(22) EMPLOYEES OF THE DEPARTMENT OF ADMINISTRATION OR ITS SUCCESSOR SHALL NOT INFLUENCE OR ATTEMPT TO INFLUENCE THE DISTRICT-MAPPING DECISIONS OF THE INDEPENDENT REDISTRICTING COMMISSION.

(23) EACH COMMISSIONER'S DUTIES ESTABLISHED BY THIS SECTION EXPIRE UPON THE APPOINTMENT OF THE FIRST MEMBER OF THE NEXT REDISTRICTING COMMISSION. THE INDEPENDENT REDISTRICTING COMMISSION SHALL NOT MEET OR INCUR EXPENSES AFTER THE REDISTRICTING PLAN IS COMPLETED, EXCEPT IF LITIGATION OR ANY GOVERNMENT APPROVAL OF THE PLAN IS PENDING, OR TO REVISE DISTRICTS IF REQUIRED BY COURT DECISIONS OR IF THE NUMBER OF CONGRESSIONAL OR LEGISLATIVE DISTRICTS IS CHANGED.

THE SECRETARY OF STATE SHALL SUBMIT THIS PROPOSITION TO THE VOTERS AT THE NEXT GENERAL ELECTION.

ANALYSIS BY LEGISLATIVE COUNCIL

Proposition 106 would amend the Arizona Constitution to establish an appointed Redistricting Commission to redraw the boundaries for Arizona's legislative districts (for the members of the Arizona Legislature) and to redraw the boundaries for the Congressional Districts (for Arizona's members of the United States Congress). Currently, state law provides that the Arizona Legislature draws the legislative and congressional district lines. These lines are usually redrawn every ten years, after the state receives the results of the U.S. Census. This proposition provides that the appointed Redistricting Commission shall first draw districts that are equal in population in a grid-like pattern across the state, with adjustments to meet the following goals:

1. Districts shall comply with the United States Constitution and the federal Voting Rights Act.

2. Both legislative and congressional districts shall be equal in population, to the extent practicable. This establishes a new strict population equality standard for legislative districts.

3. Districts shall be geographically compact and contiguous, as much as practical.

4. District boundaries shall respect "communities of interest," as much as practical.

5. District lines shall follow visible geographic features, and city, town and county boundaries and undivided "census tracts" as much as practical.

6. Political party registration, voting history data and residences of incumbents and other candidates may not be used to create district maps.

7. "Competitive districts" are favored if competitive districts do not significantly harm the other goals listed.

The Redistricting Commission would consist of five members, no more than two of whom can be from the same political party or the same county. Persons would be eligible for membership on the commission if they meet certain voter registration requirements, and if during the last three years, they have not been candidates for public office or appointed to public office, except for school board members or officers, have not served as an officer of a political party or as an officer of a candidate's election committee and if they have not been a paid lobbyist. The Speaker of the Arizona House of Representatives, the Minority Party Leader of the Arizona House of Representatives, the President of the Arizona State Senate and the Minority Party Leader of the Arizona State Senate would each appoint one person to the Redistricting Commission. These four members of the Redistricting Commission would then meet and vote to appoint a fifth member to chair the commission. The commission would provide at least 30 days for the public to review the preliminary lines drawn by the commission, and then the commission would make the lines final, subject to approval by the United States Department of Justice.

Proposition 106 allocates $6 million to the Redistricting Commission for use in the redistricting

process that begins in 2001 and allows additional money for later redistricting.

Proposition 106 Fiscal Impact Summary

Proposition 106 allocates $6,000,000 from general state revenue to the redistricting commission for use in the redistricting process that begins in 2001. Redistricting expenses are incurred once every ten years after the completion of the decennial census. If the Proposition is not approved, the current method of redistricting will continue to require funding. The sum of $3,000,000 has already been enacted into law for the current process.

ARGUMENTS "FOR" PROPOSITION 106

Every once in a while, an issue comes along that makes so much sense and so clearly embodies the basic principles of democracy, people put aside their partisan differences and take action to protect the collective interest of citizen self-government.

The Citizen's Redistricting Commission Initiative is such an issue. A simple idea about giving citizens a central role in creating more representative democracy with so much common sense appeal that it enjoys the support of Arizonans statewide.

Amending the state constitution is no small matter and this is no minor issue.

Every 10 years, state legislators redraw the lines of Arizona's legislative and congressional districts. It's a once-a-decade political power struggle that has grown more important as the state has grown.

When legislators draw their own lines the result is predictable. Self-interest is served first and the public interest comes in a distant second. Incumbent

legislators protect their seats for today and carve out new congressional opportunities for their political future.

The legislature has created a system that distorts representative democracy. There is only a four-percent difference between the number of registered Republicans and registered Democrats in this state—yet out of 30 legislative districts, there is only one where the difference in party registration is within 5 percent.

Allowing legislators draw the lines is the ultimate conflict of interest.

I am lifelong Arizonan. I was born in Casa Grande. I attended the University of Arizona. I've built a business here and I've raised a family. There are thousands of Arizonans who share a similar background—and more who have chosen to move to Arizona and call it home.

Our voices cannot be heard in a system that distorts our representation. We share a responsibility to step forward and correct this systemic flaw.

Jim Pederson, Phoenix, Chairman,
Fair Districts, Fair Elections
Paid for by Fair Districts, Fair Elections

We need a simpler and fairer way to draw voting districts. Currently districts are drawn to promote single party dominance and protect incumbents resulting in reduced voter confidence. While the Legislature could create a simpler and less partisan way, it would require the members to voluntarily give up the power to control their own political fate. That has never happened in the past and is unlikely in the

future. The public will continue to be barred from meaningful participation in the process until we create an independent redistricting commission. Your YES vote can make that happen.

Two years ago Arizona had a record low number of legislative candidates. Nearly half of the districts had no choice of candidates and in most of the rest, the preponderance of a single party effectively predetermined the election outcome.

Current district maps are contorted boundaries lacing together isolated pockets of special interests to form bulletproof districts for incumbents. Decisions, if any, are made in the primary elections. It recalls the political cartoon of the evil "Gerrymander" reptile that lent its name to such maps.

Opponents argue a redistricting commission would eliminate public accountability. To the contrary, there is no public accountability now.

District maps are secretly drawn by powerful party leaders, hidden from the public. Even other members of the legislature are barred from viewing the maps until they are essentially complete.

Voting districts are redrawn every ten years to ensure full representation of all voters. The issue is too important for petty partisan concerns. If a party's issues only have merit because they are able to manipulate and contort the process then their basic political philosophy is suspect. Healthy and competitive districts are far more likely to foster strong political debate.

We urge all Arizonans to VOTE YES on Proposition 106.

Lisa Graham Keegan, Peoria,
Superintendent of Public Instruction
John C. Keegan, Peoria, Mayor of Peoria

The Citizens' Independent Redistricting Commission has put forth an initiative which is long overdue.

It allows you, the citizen, to have a voice in drawing the boundaries for your legislative and congressional districts. Through open meetings throughout the State—not backroom dealing—we will have a process run by the public.

This initiative takes redistricting out of the hands of incumbents who too often draw district lines to protect their seats rather than to create fair, competitive legislative and congressional districts.

This initiative is fair to all Arizonans because it opens up the system to public scrutiny; it eliminates conflicts of interest by taking the process of redistricting out of incumbents' hands; and, it just might encourage more people to run for public office.

We need a politically neutral commission to handle redistricting.

Join me in voting "Yes" on Proposition 106.

Janet Napolitano,
Phoenix, Arizona Attorney General

Common Cause urges Yes on Proposition 106, Fair Districts, Fair Elections, The Citizens Independent Redistricting Commission Initiative.

The present system of allowing incumbent politicians to redraw their own district boundaries is

"the ultimate conflict of interest," according to Grant Woods, former Arizona Attorney General.

He is joined in his opinion, and in his endorsement of this initiative, by leaders from both parties, including Janet Napolitano, Sue Gerard, Rose Mofford, John and Lisa Keegan, Skip Rimsza, Polly Rosenbaum and many others, including the League of Women Voters. Why? Because, when incumbents remove areas from their district where competitors live, or where people from opposing parties live, districts become politically imbalanced and voters no longer have no real choices. This citizen initiative will create fair districts and fair elections in Arizona. We will see better candidates and better government as a result. Real competition is as good for government as it is for business.

Arizona Common Cause is a nonpartisan group of over 3,000 Arizona families with a long history of working for open, clean, and sensible self-government.

Dennis Burke, Executive Officer,
Arizona Common Cause, Phoenix
Miriam Neiman, Treasurer,
Arizona Common Cause, Sun City
Paid for by Arizona Common Cause

The Arizona School Boards Association supports Proposition 106 because it would remove the redrawing of legislative and congressional district boundaries from those with the greatest conflict of interest, incumbent legislators. This conflict of interest could be compared to the parable of the "fox guarding the hen house." Instead, this "once every ten years" exercise under Proposition 106 would be in the

hands of an independent redistricting commission made up of ordinary citizens.

The Commission would have five members, one each selected by the House Speaker and minority leader and one each selected by the Senate President and minority leader, and these four appointees have to agree on the fifth member that is not from either major party. No two members can be from the same county and no more than two can be from the same political party. All members of the Commission must be selected from a pool of 25 candidates selected by a non partisan commission. No current elected officials, lobbyists or officers of a political party or precinct committeemen are eligible to serve as candidates.

This method would remove the temptation to determine boundaries based upon the numbers of political party registrants living within an area allowing the commission to concentrate on its mandate to create districts that: 1) comply with the U.S. Voting Rights Act; 2) have equal population; 3) are geographically compact and contiguous; 4) reflect communities of interest 5) to the extent possible, use visible boundary lines. Compare this process with the current method whereby legislators can create safe districts for themselves ensuring little competition.

This is an unparalleled opportunity to create a legislature more responsive to the priorities and concerns of Arizona's citizens. The Arizona School Boards Association, comprised of locally elected school board members, urges you to vote YES on Proposition 106.

Myrna Sheppard, President,
Arizona School Boards Association, Phoenix
Harry Garewal, Vice President,
Arizona School Boards Association, Phoenix
Paid for by Arizona School Boards Association, Inc.

Dear Arizona Voters:

No quotas for Democrats, no welfare for Republicans. That's the simple philosophy behind the Fair Districts Fair Elections citizen's initiative.

For too long, both parties have created legislative and congressional districts to protect their incumbents. Such "gerrymandering" eliminates real political competition and shortchanges all of us. Why?

Because good people don't run for office because they don't think they can win. Incumbents don't stay in touch with voters because no one challenges them.

Just think back to the lively Republican nomination fight between John McCain and George Bush. It resulted in a great debate between two capable people that excited voters all across the country. While Fair Districts Fair Elections can't promise you McCain vs. Bush, it can promise more balanced legislative and congressional districts that don't give such huge advantages to incumbents and to one party over another.

By transferring redistricting responsibility from self-interested politicians to an independent citizen's panel, Fair Districts Fair Elections will generate more competition, more accountability and better government for all Arizonans.

As long-time Republicans and public servants, we're proud to support this kind of reform for Arizona

along with the Honorable Lisa Keegan, Superintendent of Public Instruction; Honorable Jack Jewett, former Tucson legislator; Senator Sue Grace, District 24 and Honorable Jim Bruner, former Maricopa County Supervisor.

Susan Gerard, Phoenix, Representative, District 18
Grant Woods, Phoenix,
Former Arizona Attorney General
William A. Mundell, Phoenix,
Arizona Corporation Commissioner

The League of Women Voters works to encourage the informed and active participation of citizens in government. Looking for reasons why the number of people participating in the voting process has declined, we found the boundaries of legislative districts are drawn so that only one party's candidates have a realistic chance of winning. Also, many legislative candidates faced no opposition in their bid for office. We found citizens who saw no reason to vote when the outcome of an election seemed predetermined. And, we found legislators who, when they know they had no opposition, had no incentive to listen to their constituents.

We need competitive districts to encourage citizens to vote, people to run for office, and representatives to respond to constituents' concerns. Every election cycle the ballot is filled with initiatives because a "disconnect" exists between many legislators and their constituents. The Legislature consistently fails to adequately address issues that citizens care about, issues such as education and health care.

We believe that moving the power to draw congressional and legislative districts from the legislature to a citizens commission will change the system. We urge a "yes" vote on Proposition 106, the Citizens Independent Redistricting Commission Initiative.

Ann Eschinger, President,
League of Women Voters of Arizona, Phoenix
Willi Waltrip, 2nd Vice President,
League of Women Voters of Arizona, Phoenix
Paid for by League of Women Voters of Arizona

Dear Arizona Voters:

We are fortunate and honored to serve, and have served, as mayors in some of Arizona's great cities. As a result, we know how important it is to stay in touch with you—the people who make our communities the outstanding places they are.

Being in touch, staying responsive—these are just two of the reasons we encourage you to vote "Yes" on Proposition 106, the Fair Districts Fair Elections Initiative.

Right now, legislative and congressional districts are drawn in a way that protects incumbents. The current system does not encourage candidate competition. Consequently, many legislators never face competition. When this happens, they get farther and farther away from the pulse of the community—farther away from your concerns.

Fair Districts Fair Elections responsibly reforms our redistricting system in a way that will create more competition for our elected officials, which in turn, will create better government for all of us.

Furthermore, Fair Districts will keep cities together within legislative and congressional districts. Right now, cities may have two, three or more districts running through their boundaries. This isn't right. To the fullest extent possible, cities should have more coherent representation so their concerns and issues can be more clearly expressed at the State Capitol and in Washington, D.C.

Whether you are the mayor of a city or simply a resident that wants more responsive government, Proposition 106 is one that clearly makes common sense.

Join us along with mayors: John Keegan, Peoria; Joan H. Shafer, Surprise; Robert Mitchell, Casa Grande; Edward Lowry, Paradise Valley; Skip Rimsza, Phoenix; Larry "Roach" Roberts, Wickenburg; George Miller, former Mayor of Tucson; Paul Johnson, former Mayor of Phoenix and Daniel Schweiker, Vice Mayor of Paradise Valley—VOTE YES ON 106.

Neil G. Giuliano, Mayor of Tempe, Tempe
Sam Campana,
former Mayor of Scottsdale, Scottsdale
Terry Goddard, former Mayor of Phoenix, Phoenix
Paid for by Fair Districts, Fair Elections

A fair and impartial system of redistricting the state and federal election districts is the right thing to do for Arizona's future.

Rebecca Rios, State Representative,
District 7, Phoenix

I support the Citizens Independent Redistricting Commission initiative because I think it will be good for rural Arizona. Under the current system many

small towns across the state get divided between two different legislative districts. When this happens our voice is diluted. This has been done not only to Sierra Vista but to towns all across the state—Casa Grande, Kingman, Gila Bend, Nogales, and even tiny towns like Tubac and Patagonia! Bullhead City is the worst example—split into *three* legislative districts!

Then, when legislators draw congressional district boundaries, rural voices are again diluted in districts which draw most of their voters from metropolitan Maricopa County (primarily) and Pima County. The attention of our Representatives is concentrated on the metropolitan area where the bulk of their constituents reside. This just doesn't seem fair; rural Arizona deserves at least some representation in Congress.

Carolyn Edwards, Sierra Vista

Why can't our legislators reach compromise on issues most important to mainstream Arizona?

Better legislative decisions are possible when the Legislature represents all citizens of Arizona in approximate proportion to their political beliefs. Most Arizonans are centrists—they generally support middle-of-the-road policies rather than those more extreme. In fact, there is only a 4% difference between the number of registered Democrats and registered Republicans in Arizona.

How is it then that we have been saddled with our current, ideologically polarized Legislature?

In Arizona, incumbent legislators redraw boundaries for legislative and congressional districts every ten years. Theoretically, this is done to maintain

a balance in population among the various districts. Unfortunately, our legislators have a history of manipulating the redistricting process by stacking "their" district with members of their own party and by drawing lines which move political opponents out of "their" districts. Often times in stacked districts, the minority party in that district doesn't even field candidates for the General Election. When the General Election doesn't count, 1) Parties are more likely to promote candidates farther to the right or left of center because they don't need to worry about losing moderate and independent votes in the General Election, and 2) Voter turnout is lower leaving choices to the most heavily partisan voters in that district. In Arizona, only six of our thirty legislative districts are even remotely balanced in party registration.

Independent citizen's commissions are a better way to draw political boundaries. Incumbent legislators, who *always* have a vested interest, can't control the process. Currently, fourteen states have independent commissions draw their legislative district boundaries.

Arizona would have a better, more representative Legislature if more members were centrists and fewer were on either extreme.

Proposition 106 will surely be a giant step toward moderation and should be approved.

Joel Harnett, President,
Valley Citizens League, Phoenix
Bart Turner, Executive Director,
Valley Citizens League, Phoenix
Paid for by Valley Citizens League

ARGUMENTS "AGAINST" PROPOSITION 106

The redistricting commission amendment is a flawed proposition which will reduce the input of the will of the people of Arizona and vest disproportionate influence in the hands of bureaucratic Washington D.C. lawyers of the federal Justice Department. The people of Arizona have traditionally, through their elected representatives, drawn the lines from which the peoples' elected officials will represent them. Yes, these plans have to be submitted to the federal Justice Department for approval. But it has been our plan they have had to review—our plan drawn by our representatives—our representatives who serve with the consent of the governed. Under a commission, as experience in other states suggests, the procedure will undoubtedly be to ask the bureaucratic Washington D.C. lawyers of the federal Justice Department to design and approve the parameters under which Arizona's representatives will be elected. The Commission will be a conduit and a rubber stamp.

Arizonan's must not give up our right to determine the lines from which our officials should be elected. Do not let the bureaucratic Washington D.C. lawyers of the federal Justice Department gain disproportionate influence over our election process. Maintain the right to oversee the electoral process of redistricting and reapportionment here in Arizona with the elected representatives of the people not an appointed inexperienced elite who will be the handmaidens of the government in Washington's lawyers. Vote no on this proposition.

Barry M. Aarons, Senior Fellow
Americans for Tax Reform, Phoenix

The Arizona Chamber of Commerce recommends that voters *oppose Proposition 106* that *WILL TURN OVER THE DRAFTING OF ARIZONA'S POLITICAL DISTRICTS TO A SMALL GROUP OF FIVE INDIVIDUALS WHO ARE NOT ACCOUNTABLE TO VOTERS.*

The proponents claim Proposition 106 makes the redistricting process fair and less political by creating a commission of five non-elected individuals to draw the district maps for the entire state.

We disagree. Proposition 106 empowers a commission of political appointees who are selected from at least two counties in Arizona to draw the legislative and congressional district lines. That means 10 to 12 of Arizona's 15 separate and unique counties won't have representation. The Arizona Chamber believes that fair representation would not deny a majority of voters a voice.

This initiative further proposes to mold Arizona's political districts into a grid-like pattern. Drawing such a grid across Arizona threatens rural representation. It denies a logical opportunity to ensure broad, legislative membership.

In the end, any redistricting plan must be approved by the U.S. Justice Department. If they do not approve, they will require changes to the plan that will result in a redesign. Federal law thus denies the process of fair districts.

Rather than turning over the reshaping of Arizona's political boundaries to an uninformed group of five individuals or even worse to the Justice Department, leave the future of our boundaries with

the 90 individuals of the State Legislature *elected* by you. *We urge you to vote NO on Proposition 106.*

Greg Denk, Chairman of the Board,
Arizona Chamber of Commerce, Phoenix
Samantha A. Fearn, VP of Public Affairs,
Arizona Chamber of Commerce, Phoenix
Paid for by Arizona Chamber of Commerce

Accountability. It is what you expect from your elected officials at all levels of government. And, it is the standard to which we hold ourselves—to be accountable to you.

Unfortunately, Prop. 106, the "Citizens Independent Redistricting Commission" lacks any accountability. It is an attempt by special interest groups who want to change the redistricting process because they do not like who you have elected to represent you. They want to change the process in their favor rather than participate in the democratic process of elections.

This measure is seriously flawed. Contrary to the arguments its proponents make, this initiative will make the redistricting process more secretive, more "backroom" and more political. Those who serve on the commission will have been selected for appointment by a small, powerful group of activist lawyers. That group, the Commission on Appellate Court Appointments will nominate members of the redistricting commission. While lawyers make up less than one-half of one percent of Arizona's population, they make up more than 50% of this commission.

In short, unelected, unaccountable lawyers will have more power than anyone else in the redistricting

process. That will not empower the people of Arizona. It will empower lawyers and the Bar Association.

The Legislature is elected by you and represents every county in the state. The appointed Commission in the initiative is required to have representation from only *two* counties. No one will represent the people in the other thirteen counties.

This new Commission's price tag is $6 million. We already have elected representatives to make decisions—why do we need a new $6 million bureaucracy to do the same thing?

We urge you to reject this attempt to take power out of the people's hands. Vote No on Proposition 106.

Bob Stump, United States Congressman, Tolleson
Jim Kolbe, United States Congressman, Tucson
J.D. Hayworth, United States Congressman, Cave Creek
Matt Salmon, United States Congressman, Mesa
John Shadegg, United States Congressman, Phoenix
Paid for by Bob Stump Election Committee

BALLOT FORMAT

PROPOSED AMENDMENT TO THE
CONSTITUTION BY THE INITIATIVE

OFFICIAL TITLE

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE IV, PART 2, SECTION 1, CONSTITUTION OF ARIZONA; RELATING TO ENDING THE PRACTICE OF GERRYMANDERING AND IMPROVING VOTER AND CANDIDATE PARTICIPATION IN ELECTIONS BY CREATING AN INDEPENDENT COMMISSION OF BALANCED APPOINTMENTS TO OVERSEE THE MAPPING OF FAIR AND COMPETITIVE CONGRESSIONAL AND LEGISLATIVE DISTRICTS.

DESCRIPTIVE TITLE

AMENDING ARIZONA CONSTITUTION TO CREATE A 5-MEMBER "CITIZENS' INDEPENDENT REDISTRICTING COMMISSION", WITH NO MORE THAN 2 MEMBERS FROM EACH POLITICAL PARTY AND NO MORE THAN 3 MEMBERS FROM EACH COUNTY, TO DRAW LEGISLATIVE AND CONGRESSIONAL DISTRICT BOUNDARIES AFTER EACH U.S. CENSUS; REMOVES REDISTRICTING AUTHORITY FROM THE ARIZONA LEGISLATURE.

PROPOSITION 106

A "yes" vote shall have the effect of creating a 5-member "Citizens' Independent Redistricting Commission" with no more than 2 members from each political party and no more than 3 members from each county, to draw legislative and congressional district boundaries and removing redistricting authority from the Arizona Legislature.	YES ☐
A "no" vote shall have the effect that the Arizona Legislature shall continue to have the authority to redraw legislative and congressional district boundaries.	NO ☐

APPELLANT'S BRIEF

No. 13-1314

In the
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Arizona

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QUESTIONS PRESENTED

1. Do the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts?

2. Does the Arizona Legislature have standing to bring this suit?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, appellees include Colleen Mathis, Linda J. McNulty, Cid R. Kallen, Scott D. Freeman, and Richard Stertz in their official capacities as members of the Arizona Independent Redistricting Commission, and Ken Bennett in his official capacity as Secretary of State of Arizona.

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OPINION BELOW

The district court's opinion is reported at 997 F. Supp. 2d 1047 and reproduced at Pet.App.2-23.

JURISDICTION

This is an appeal from the judgment of a three-judge district court convened under 28 U.S.C. §2284(a). The district court issued its decision on February 21, 2014. Appellant filed a timely jurisdictional statement on April 28, 2014. On October 2, 2014, this Court postponed further consideration of jurisdiction to a hearing on the merits. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Elections Clause of the United States Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, §4, cl. 1.

Section 2a of Title 2 of the United States Code is reproduced in the addendum to this brief.

Relevant provisions of the Arizona Constitution are also reproduced in the addendum to this brief.

STATEMENT OF THE CASE

The Elections Clause of the U.S. Constitution delegates the task of "prescrib[ing] ... Regulations" concerning the times, places, and manner of congressional elections in each State to "the Legislature thereof." And for nearly ninety years, consistent with this explicit conferral of authority, the Arizona State Legislature adopted Arizona's congressional districts subject to the normal constraints on the ordinary legislative process, including the possibility of a gubernatorial veto. That all changed in 2000 when voters approved an amendment to the Arizona Constitution completely removing the redistricting power from the Legislature and putting it in the hands of the Arizona Independent Redistricting Commission (IRC). Five unelected individuals with ten-year terms now formulate, adopt, and certify Arizona's congressional districts wholly outside the ordinary legislative process. By design, the Legislature plays no role in prescribing congressional districts and cannot pass any law modifying or overriding the IRC's maps. In short, the Legislature has been completely divested of its redistricting power despite Article I's straightforward delegation of that power to "the Legislature" of each State.

Following completion of the most recent IRC-formulated districting maps, the Legislature voted to file suit, alleging that the wholesale removal of its redistricting authority and the use of IRC-drawn maps violates the Elections Clause. A divided three-judge district court rejected that challenge by construing the Constitution's express delegation to "the Legislature"

to permit States to delegate that power to another entity and to divest the Legislature entirely of the authority to prescribe congressional districts. The Legislature appealed to this Court, which postponed jurisdiction to a hearing on the merits of whether the Elections Clause and 2 U.S.C. §2a(c) permit Arizona's use of the IRC to adopt congressional districts. The Court also asked whether the Legislature has standing to bring this suit.

A. The Arizona Independent Redistricting Commission

From the first year of Arizona's statehood in 1912 until 2000, the Arizona State Legislature adopted Arizona's congressional districts, consistent with the practice in almost every other State. Pet.App.3. During that period, the Legislature drafted, debated, and passed redistricting measures as it would any other law. Redistricting measures were introduced as proposed legislation, then referred to a bipartisan joint committee on redistricting, which would review, debate, and recommend amendments. The proposed legislation, along with any recommended committee amendments, was then recommended to the body as a whole, which had the power to approve the recommendations of the joint committee or to make changes. The legislation was then read on three separate days on the floor and voted on by the body. After approval, it was sent to the Governor. The Governor could veto the legislation, but the Legislature could override the Governor's veto upon two-thirds vote by each chamber. Pet.App.3, 41; Ariz. Const. art. V, §7.

Like any other legislation, redistricting measures occasionally triggered these checks and balances. For example, in 1981 the Governor vetoed a legislative effort to redraw congressional district lines, and the Legislature overrode the Governor's veto. Pet.App.42; *Goddard v. Babbitt*, 536 F. Supp. 538, 541 (D. Ariz. 1982).

In 2000, a citizen group placed an initiative measure on the ballot designed to change all of this. J.A.17. In its application to the Secretary of State, the group explained that it sought to amend the Arizona state constitution to "create a new 'citizens' independent redistricting commission.'" *Id.* The amendment would "take[] the redistricting power away from the Arizona Legislature" and give it to the commission, which would "draw new legislative and congressional district boundaries after each U.S. Census." J.A.17-18. The Arizona Secretary of State designated the proposal Proposition 106. J.A.18. The official ballot explained that voting for Proposition 106 meant "removing redistricting authority from the Arizona Legislature." J.A.80. The measure passed with 56% of the votes cast. J.A.18.

The Arizona Independent Redistricting Commission (IRC) convenes at the beginning of every year ending in the number one (*e.g.*, 2001, 2011, etc.). Ariz. Const. art. IV, pt. 2, §1(3). It consists of five members chosen every ten years via a multi-step process. *Id.* First, the state Commission on Appellate Court Appointments establishes a pool of 25 candidates—ten from each of the two largest political parties in the State, and five not registered with either

of those parties. *Id.* §1(5).[1] Second, the highest-ranking officer and minority leader of each chamber of the Legislature each choose one member from that pool. *Id.* §1(6). Those four appointees then select, by majority vote, a fifth member from the pool to serve as chair. *Id.* §1(8). The fifth member cannot be registered with any party already represented on the commission, *id.*, and no more than two members of the commission may be members of the same political party, *id.* §1(3).[2] Members of the Legislature and any other holder of or candidate for public office (except school board) in the preceding three years are barred from serving on the IRC. *Id.* §1(3),(13).

Once appointed, IRC members can be removed only for gross misconduct, substantial neglect of duty, or inability to discharge the duties of the office, and only by the Governor with concurrence of two-thirds of the Senate. *Id.* §1(10). Each member's term runs until appointment of the next commission's first member—approximately ten years, ordinarily. *Id.* §1(23). The IRC's sole function is to undertake redistricting: it "shall establish congressional and legislative districts." *Id.* §1(14). The proposition directs the IRC

---

[1] The Commission on Appellate Court Appointments consists of the chief justice of the Arizona Supreme Court, five appointed attorneys, and ten appointed non-attorney members. Ariz. Const. art. VI, §36. It is located within the Judicial Branch. *Id.* Before its IRC-related duties were added, the Commission's "single function" was reviewing and nominating candidates for appointment to the Arizona appellate courts. *Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 712 (Ariz. 2000).

[2] In practice, therefore, the selection criteria effectively guarantee that the IRC will be comprised of two Democrats, two Republicans, and one "independent" who serves as chair.

to create Arizona's congressional district map based on a list of factors that include compliance with the U.S. Constitution and Voting Rights Act; equal population; geographic compactness and contiguity; respect for "communities of interest"; use of geographic features and city and county boundaries; and the favoring of "competitive districts." *Id.* After a minimum 30-day public comment period on a draft map, the IRC "shall" establish "final district boundaries" and "shall" certify the final maps to the Secretary of State. *Id.* §1(16)-(17). Once the IRC completes redistricting, it "shall not meet" except to "revise districts if required by court decisions" or if the number of districts changes. *Id.* §1(23). The provisions governing the IRC's redistricting process are "self-executing," *id.* §1(17), meaning that they "operate ... without the necessity of further legislative action," *Miller v. Wilson*, 129 P.2d 668, 670 (Ariz. 1942).

During the public comment period, either or both chambers of the Legislature may "make recommendations to" the IRC, and those recommendations "shall be considered" by the IRC. Ariz. Const. art. IV, pt. 2, §1(16). But the recommendations are not binding, and the IRC is under no obligation to do anything more than "consider[]" them. Members of the public may also make recommendations regarding the draft maps. *Id.* But as with the Legislature's recommendations, the IRC has no obligation to make any changes in response.

The Legislature has no other role in the redistricting process. Indeed, the Legislature may not

enact legislation modifying or overriding congressional districts adopted and certified by the IRC, and the Legislature may not enact any measure that eliminates or adversely affects the provisions establishing and authorizing the use of the IRC, or that diverts funds away from the IRC. *See id.* art. IV, pt. 1, §1(6)(B)-(D); *id.* §1(14). On the contrary, the Legislature must make "necessary appropriations" for the IRC's work. *Id.* art. IV, pt. 2, §1(18). Furthermore, unlike congressional districts previously adopted by the Legislature, IRC-created congressional districts may not be vetoed by the Governor, nor rejected by Arizona voters via popular referendum. *See id.* §1(16)-(17) (IRC alone establishes "final district boundaries" and certifies them directly to Secretary of State); *id.* art. IV, pt. 1, §1(1),(3)-(4) ("[r]eferendum power" extends only to measures "enacted by the legislature"). The IRC's maps are, of course, subject to judicial challenges and have engendered considerable litigation. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014), *appeal docketed*, No. 14-232 (U.S. Aug. 28, 2014); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676 (Ariz. 2009) (en banc); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F Supp. 2d 887 (D. Ariz. 2005); *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002).

B. Proceedings Below

On January 17, 2012, the IRC approved final congressional redistricting maps and certified them to the Secretary of State. The IRC's maps will thus be used in congressional elections until a new IRC convenes in 2021. Pet.App.4. Subsequently, each chamber of the Legislature voted to authorize the filing of suit in order to "defend [its] authority ... related to redistricting" under the U.S. Constitution. J.A.26-27 (Senate authorization); J.A.46 (House authorization). On June 6, 2012, the Legislature filed suit in the United States District Court for the District of Arizona. Pet.App.4. The Legislature sought a declaration that the removal of its redistricting authority violates the Elections Clause, a declaration that the IRC's congressional maps are unconstitutional and void, and an injunction barring the adoption, implementation, or enforcement of any congressional maps created by the IRC, including the current maps. Pet.App.4; J.A.21-23. The Legislature did not advance any claim based on 2 U.S.C. §2a(c). Pursuant to 28 U.S.C. §2284(a), a three-judge court was convened to consider the Legislature's challenge.

In a divided decision, the court granted the IRC's motion to dismiss for failure to state a claim. The majority acknowledged at the outset that Proposition 106 "removed congressional redistricting authority from the Legislature" and "vested that authority in" the IRC. Pet.App.3. It ruled first that the Legislature has standing to bring suit because Proposition 106 "resulted in the Legislature losing its authority to draw congressional districts," and that "loss of redistricting power constitutes a concrete injury," not

just an "'abstract dilution of institutional legislative power.'" Pet.App.5-6 (quoting *Raines v. Byrd*, 521 U.S. 811, 826 (1997)).

On the merits, the majority held that Arizona's use of the IRC to adopt congressional districts does not violate the Elections Clause. Citing *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932), the majority asserted that this Court has "twice rejected the notion that when it comes to congressional redistricting the Elections Clause vests only in the legislature responsibilities relating to redistricting." Pet.App.10. Those cases, the majority believed, "demonstrate that the word 'Legislature' in the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws." Pet.App.15. Thus the "relevant inquiry is not whether Arizona has uniquely conferred its legislative power in representative bodies" but "whether the redistricting process it has designated results from the appropriate exercise of state law." Pet.App.17; *see also* Pet.App.18 (stating that the "relevant inquiry is not what role, *if any*, the state legislature plays in redistricting, but rather whether the state has appropriately exercised its authority in providing for that redistricting" (emphasis added)). The majority held that the Elections Clause "does not prohibit a state from vesting the power to conduct congressional districting elsewhere within its legislative powers." Pet.App.19. Because "[i]n Arizona the lawmaking power plainly includes the power to enact laws through initiative," it concluded, the Elections Clause permits the establishment and use of the IRC. *Id.*

Judge Rosenblatt dissented in part. Pet.App.20-23. He agreed that the Legislature has standing but, on the merits, disagreed that the complete divestment of the Legislature's redistricting authority is consistent with the Elections Clause. Pet.App.20. He observed that *Hildebrant* and *Smiley* involved "situations in which the state legislature participated in the redistricting decision-making process in some very significant and meaningful capacity." Pet.App.22. By contrast, Proposition 106's "acknowledged and undisputed purpose was to supplant [the Legislature's] constitutionally delegated authority to redistrict by establishing the IRC as Arizona's sole redistricting authority." *Id.* As a result, Judge Rosenblatt observed, the Legislature lacks "any outcome-defining effect on the congressional redistricting process." Pet.App.23. That result, he concluded, "is repugnant to the Elections Clause's grant of legislative authority." *Id.*

The Legislature appealed to this Court. In its motion to dismiss or affirm, the IRC abandoned its contention that the Legislature lacks standing to bring this case. *See* Reply Br. for Appellant 10 n.4, No. 13-1314 (U.S. July 14, 2014). On October 2, 2014, the Court postponed further consideration of the question of jurisdiction to a hearing of this case on the merits. 135 S. Ct. 46 (2014). The Court phrased the question presented on the merits as whether "the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts." *Id.* The Court also asked whether the Legislature has standing to bring this case. *Id.*

SUMMARY OF ARGUMENT

The Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) do not permit Arizona's use of the IRC to adopt congressional districts, and the Legislature has standing to bring this suit.

I. The Legislature readily meets the irreducible constitutional minimum of Article III standing. The Elections Clause explicitly vests the authority to "prescribe[] ... Regulations" concerning the times, places, and manner of congressional elections in each State to "the Legislature thereof." Here, the Legislature has been completely deprived of that power, which is now in the hands of the IRC. The divestment of the Legislature's constitutionally-conferred redistricting authority clearly constitutes an actual, concrete, and particularized injury to the Legislature. The Legislature's injury is directly traceable to the IRC's usurpation of the Legislature's redistricting authority, and a favorable decision by this Court will plainly redress the Legislature's injury by restoring its constitutional authority.

States and other State-level entities routinely seek redress in federal court when deprived of rights or powers conferred or protected by the federal Constitution. There is no reason to treat a state legislature differently when it has been deprived of a power specifically conferred upon it by the federal Constitution. That is especially so when, as here, the unconstitutional usurpation is worked by an initiative, rather than through the ordinary legislative process. Whatever issues might be implicated by a scenario where a legislative party complains of a "self-

inflicted wound," here there is no possibility of repeal or resort to political remedies to redress the injury worked by Proposition 106 and the IRC-drawn maps. The Legislature's injury was not caused by the Legislature, and it cannot be remedied by the Legislature. Recourse in the federal courts is both permissible and appropriate.

II. The Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) do not permit Arizona's use of the IRC to adopt congressional districts. The Elections Clause expressly delegates the power to "prescribe[] ... Regulations" concerning congressional districts to one specific entity: "the Legislature" of a State. The term "the Legislature" is clear and explicit and has an unambiguous meaning repeatedly recognized by the Framers and this Court: the representative lawmaking body of a State. In the Constitution, the Framers carefully assigned particular obligations to particular State-level entities, whether the "people," the "legislature," the "executive," or the "State" generally. That precise division of labor leaves no doubt that they intended that "the Legislature"—meaning the representative lawmaking body—be the entity that "prescribe[s] ... Regulations" governing redistricting.

The Framers' delegation of State-level authority over congressional elections, including redistricting, to "the Legislature" is consistent with the Framers' relative confidence in republican democracy—*i.e.*, government through elected representatives—over other forms of government. It is consistent with their concern that giving States unbridled control of federal elections could eradicate the nascent federal

government. And it is consistent with the Framers' assurance that reserving a residual backstop role for Congress would not threaten the States, because both the entity primarily tasked with prescribing congressional election regulations and the Congress were both representative legislatures.

Given the plain text and history of the Elections Clause, Arizona's use of the IRC to adopt congressional districts cannot stand. By design, the Legislature has been completely divested of all authority to prescribe congressional districts; that power has been wholly transferred to the IRC, which is not and cannot claim to be the state legislature. The Legislature cannot modify or reject the IRC's districting maps; nor, for that matter, can the Governor or the people directly. The Legislature cannot pass any law repealing the creation and use of the IRC or interfering with its purpose. The complete exclusion of the representative lawmaking body in Arizona simply cannot be squared with the command of the Elections Clause that the times, places, and manner of congressional elections be "prescribed in each State by the Legislature thereof."

No decision of this Court, moreover, supports that unprecedented result. *Hildebrant* and *Smiley*, on which the district court heavily relied, are easily distinguishable. Both decisions expressly contemplate a continuing major role for the state legislature in prescribing congressional districts and did not address situations where, as here, the Legislature was completely cut out of the process. Even more significant, those cases simply rejected the rather bold assertion that the Elections Clause trumps a State's

ordinary legislative process, such that generally applicable constraints on a state legislature's lawmaking power (*e.g.*, a veto via gubernatorial action or referendum) are inapplicable to congressional redistricting. The Court's rejection of that sweeping proposition in no way suggests that States may cut out their legislatures altogether in an effort to take the politics out of redistricting. Unlike the laws at issue in *Hildebrant* and *Smiley*, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). It is an unabashed effort to divest the redistricting authority from the Legislature in clear contravention of the Elections Clause.

Finally, 2 U.S.C. §2a(c) does not somehow authorize Arizona's use of the IRC to adopt congressional districts. Indeed, 2 U.S.C. §2a(c) has no relevance here. On its face, the statute addresses only the default rules when the state redistricting process is deadlocked in the wake of a decennial census. Moreover, because much of 2 U.S.C. §2(a)(c) sets forth default rules that are wholly incompatible with one-person-one-vote principles, the Court has construed 2 U.S.C. §2a(c) so that it applies only in the narrowest of circumstances: when neither a state legislature, nor a state court, nor a federal court has developed a redistricting plan before a congressional election. There is absolutely no basis for arguing that this largely obsolete provision authorizes States to do anything in particular, let alone to vest the authority for prescribing election regulations in an entity other than the one specified in the Elections Clause. Any such construction would raise grave constitutional difficulties that this Court is duty bound to avoid engendering.

ARGUMENT

I. The Legislature Has Standing To Challenge The Complete Divestment Of Its Redistricting Authority.

A. The Legislature Satisfies the Three Requirements of Standing.

The requirements of Article III standing are by now well-established. The plaintiff must allege "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The Legislature readily satisfies all three prerequisites.[3]

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[3] The IRC did not challenge the Legislature's standing until some 18 months into the case, after it had filed several other dispositive motions, and it then abandoned its standing argument in its motion to dismiss or affirm before this Court. This Court has "an independent obligation to assure [itself] that jurisdiction is proper," *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008), but the fact that a standing challenge did not occur to the IRC until 18 months into the litigation and was then abandoned underscores that the Legislature straightforwardly satisfies the requirements for Article III standing. And to the extent the IRC would attempt to inject considerations of prudential standing into the case at this late juncture, the IRC's tardiness and abandonment would be fatal. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-87 & 1387 nn.3-4 (2014) (noting that prudential standing does not implicate subject-matter jurisdiction); *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012) (holding that prudential standing argument was waived).

The Legislature has plainly suffered an injury in fact in the form of a direct usurpation of its constitutionally-conferred authority to adopt congressional districts. The Elections Clause explicitly vests redistricting authority in state legislatures: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*." U.S. Const. art. I, §4 (emphasis added). Since the Founding, state legislatures have undertaken this critical duty as part and parcel of their "authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Indeed, this Court has repeatedly recognized that the "primary responsibility" for redistricting "rests with the legislature itself." *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964); *see also White v. Weiser*, 412 U.S. 783, 794-95 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment."); pp. 51-53, *infra*.

But in Arizona, the Legislature has been entirely divested of all authority to perform this "most significant act[]." *League of United Latin Amer. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (plurality). Instead of the Legislature, the IRC "shall establish congressional and legislative districts." Ariz. Const. art. IV, pt. 2, §1(14). The complete deprivation of the Legislature's power to undertake that critical function conferred on it by the Elections Clause clearly constitutes an "'actual or imminent'" injury. *Driehaus*, 134 S. Ct. at 2341 (quoting *Lujan*, 504 U.S. at 560).

Moreover, the Legislature's injury is "concrete and particularized." *Id.* The Elections Clause plainly grants the Legislature the authority to "prescribe[] ... Regulations" for congressional elections, and Proposition 106 and the IRC-promulgated maps just as plainly take it away. This is far from the "undifferentiated, generalized grievance" of other plaintiffs who have waged unsuccessful challenges about the meaning of the Elections Clause. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam) (ordering dismissal of Elections Clause challenge brought by four voters alleging "that the law ... has not been followed"). Because the Constitution vests congressional redistricting authority in the Legislature itself, the Legislature seeks much more than a generic ruling that the Elections Clause "has not been followed." *Id.* The Legislature seeks the return of *its* constitutionally-conferred redistricting authority.

The Legislature likewise amply satisfies the Article III requirements of traceability and redressability. Indeed, the IRC has never suggested otherwise. The "causal connection" between the Legislature's loss of redistricting authority and the use of the IRC is unmistakable. *Lujan*, 504 U.S. at 560; *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997) (injury must be "'fairly traceable' to the actions of the defendant" (quoting *Lujan*, 504 U.S. at 560)). The IRC exists for one, and only one, purpose: to displace the Legislature in exercising redistricting authority in Arizona. The Legislature's inability to exercise authority granted to it under the Constitution is clearly traceable to the IRC's exercise of the authority

granted by Proposition 106 at the expense of the Legislature.

A decision of this Court holding that the IRC may not wholly displace the Legislature would also plainly redress the Legislature's injury. *Lujan*, 504 U.S. at 561. The Legislature seeks, among other relief, a declaration that the Elections Clause prohibits the IRC from adopting congressional districts and an injunction preventing the IRC from adopting, implementing, or enforcing its congressional maps. J.A.22-23. Should this Court rule in the Legislature's favor, it would restore the Legislature's redistricting authority. A favorable decision would confirm that the Legislature cannot be completely divested of its constitutional authority to "prescribe" congressional districts. The Legislature would indisputably "benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975). In short, under this Court's well-established jurisprudence, the Legislature has amply satisfied the "'irreducible constitutional minimum' of standing." *Bennett*, 520 U.S. at 162 (quoting *Lujan*, 504 U.S. at 560).

B. The Legislature's Status as a Legislature Provides No Basis for Deviating From This Court's Standing Jurisprudence.

Applying the traditional tripartite test under Article III, the Legislature's standing to vindicate its constitutionally-prescribed role is straightforward. To be sure, the Legislature seeks to vindicate its institutional interests, rather than to avoid some pocketbook injury. But that is hardly unusual and implicates no independent Article III difficulty. This Court routinely recognizes the ability of institutional

litigants to redress institutional injuries, including the loss of constitutionally-conferred rights or powers. For example, in *New York v. United States*, 505 U.S. 144 (1992), four States successfully claimed that the federal Low-Level Radioactive Waste Policy Act invaded their expressly reserved Tenth Amendment powers. *Id.* at 154. Before that, South Dakota sued to vindicate authority granted to it by the Twenty-First Amendment. *South Dakota v. Dole*, 483 U.S. 203 (1987); *see also FERC v. Mississippi*, 456 U.S. 742, 752 (1982) (challenge by Mississippi to vindicate Tenth Amendment authority); *Maryland v. Wirtz*, 392 U.S. 183, 187 (1968) (challenge by Maryland and 27 other States that Congress exceeded Commerce Clause power in passing Fair Labor Standards Act).

And the ability of institutional litigants to sue to vindicate institutional interests is hardly limited to States. For example, state agencies and school boards are routinely permitted to bring suit to redress institutional injuries, including the loss of constitutionally-granted rights or powers. *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Bd. of Educ. of Ottawa Twp. High Sch. Dist. 140 v. Spellings*, 517 F.3d 922, 925 (7th Cir. 2008); *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894 (6th Cir. 1990). It would be more than passing strange to conclude that a local school board or state gravel commission can sue to vindicate its constitutional prerogatives, but a state legislature somehow lacks Article III standing.

There is certainly no principled reason to treat a state legislature differently from other institutional litigants when it suffers a usurpation of its

constitutional authority by external forces. Whatever distinct concerns might be implicated by a legislative challenge to a divestment of authority by a legislative act, this case does not involve any such "self-inflicted wound." Here, the Legislature had its constitutionally-delegated power usurped through the initiative process, and the Legislature challenges the IRC's exercise of redistricting authority that it cannot countermand through an exercise of its own legislative power. This is manifestly not a situation where the Legislature has an avenue of self-help available that distinguishes it from other litigants.[4] Unlike suits involving "mere intra-parliamentary controvers[ies]," *Coleman v. Miller*, 307 U.S. 433, 441 (1939), the Legislature cannot look to its own members to restore its constitutional authority over redistricting. *Cf. Raines v. Byrd*, 521 U.S. 811, 824 (1997) (noting that "a majority of Senators and Congressmen can vote to repeal the Act, or to exempt a given appropriations bill"). Nor is this a situation where a handful of legislators attempt to assert the institutional rights of the Legislature as a whole or seek to prevail in the courts after they failed to prevail in a legislative vote in their own chamber. Here, the Legislature as a whole seeks to remedy an injury to the Legislature as a whole that was inflicted not by any act of the Legislature but by external state action.

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[4] State law prohibits the Legislature from repealing successful initiatives. *See* Ariz. Const. art. IV, pt. 1, §1(6)(B). And the Legislature cannot amend any successful initiative "unless the amending legislation furthers the purposes of such measure." *Id.* §1(6)(C). Simply put, absent a constitutional amendment rescinding Proposition 106, the Legislature is forever barred from "prescrib[ing]" Arizona's congressional districts.

For these reasons, all three members of the district court correctly rejected the IRC's invocation of *Raines v. Byrd* to attack the Legislature's standing. *Raines* is readily distinguishable on multiple grounds. In *Raines*, six individual members of Congress, having failed to persuade enough of their fellow members to vote against the Line Item Veto Act, asked the Court to strike down that very same law as unconstitutional. The Court concluded that those members lacked standing. The Court noted that the individual members had not lost anything to which they individually were entitled, such as a seat or salary. *See id.* at 821. The only institutional injury the individual members had alleged was that the Act rendered their future votes "less 'effective' than before," and "the 'meaning' and 'integrity' of their vote" had changed. *Id.* at 825. But that injury was "wholly abstract and widely dispersed" among all members and, importantly, could have been redressed by Congress itself—by repealing the law that allegedly injured the legislators. *Id.* at 829. Finally, the Court "attach[ed] some importance" to the fact that the members were not authorized to represent their respective chambers, and both chambers actually opposed the suit. *Id.*; *see also United States v. Windsor*, 133 S. Ct. 2675, 2713 (2013) (Alito, J., dissenting) ("*Raines* dealt with individual Members of Congress and specifically pointed to the individual Members' lack of institutional endorsement as a sign of their standing problem.").

This suit is different from the failed *Raines* action in every relevant dimension. Unlike a suit by disgruntled individual legislators alleging what is really an injury to the institution, this is a suit by the

Legislature as a whole to redress a complete loss of redistricting authority, which is a concrete injury particular to the Legislature and suffered by the Legislature *qua* Legislature. And unlike the Line Item Veto Act at issue in *Raines*, the divestment of redistricting authority from the Legislature to the IRC is not a self-inflicted wound. It cannot be repealed by the Legislature, nor can the Legislature reject or modify any redistricting map formulated by the IRC. Finally, unlike in *Raines*, both chambers of the Legislature have authorized this suit. In sum, in contrast to *Raines*, this is a suit by the full Legislature to vindicate an injury suffered by the full Legislature, but where the Legislature has no ability to redress the problem itself.[5]

* * *

The question of standing in this appeal is straightforward: whether a state legislature has standing to recoup a power expressly granted to it by the United States Constitution. The clear answer is

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[5] The differences between this appeal and *Raines* are confirmed by the reasoning of *Raines* itself. The Court contrasted the suit with *Coleman v. Miller*, 307 U.S. 433 (1939), in which twenty state senators had voted for, and twenty against, a proposed constitutional amendment. 307 U.S. at 436. After the lieutenant governor cast his vote in favor of the amendment, the twenty "nay" senators filed suit challenging the lieutenant governor's right to cast the deciding vote. *Id.* The *Raines* Court explained that the *Coleman* legislators had standing to sue because, due to the challenged conduct, their votes were "completely nullified," which constituted a cognizable injury. 521 U.S. at 823-24. That reasoning *a fortiori* settles the Legislature's standing here: Arizona's use of the IRC to adopt redistricting maps and to displace the Legislature's redistricting has completely nullified the Legislature's ability to redistrict.

yes. The Legislature's "particularized stake in th[is] litigation," *Lance*, 549 U.S. at 442, guarantees that "the parties before the court have an actual, as opposed to professed, stake in the outcome." *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring). The meaning of the Elections Clause "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* And because the Legislature has a concrete stake in the outcome of the controversy, this Court is assured of the requisite "concrete adverseness which sharpens the presentation of issues" before it—namely, whether the Elections Clause permits the complete divestment of the Legislature's constitutionally-conferred redistricting power. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

II. Neither the Elections Clause Nor 2 U.S.C. §2a(c) Permits The Complete Divestment Of A State Legislature's Authority To Adopt Congressional Districts.

The Elections Clause of the United States Constitution answers the merits question presented in this case. The Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, §4, cl. 1. The plain text of this provision clearly delegates the authority to "prescribe[] ... Regulations" concerning the times, places, and manner of congressional elections, including the adoption of

congressional districts, to one entity alone: "the Legislature" of a State, which unambiguously refers to the Arizona Legislature and not the IRC. The Framers' assignment of that power to "the Legislature" reflects a considered decision to vest the initial power to regulate congressional elections in the state political body most reflective of their conception of ordered liberty: the representative lawmaking body of the people. Arizona's effort to completely oust the Legislature from the redistricting process and re-delegate that authority to the IRC is fundamentally antithetical to the Elections Clause. The Legislature no longer "prescribe[s] ... Regulations" concerning congressional districts; that task has been wholly transferred to the IRC. Nothing in this Court's precedents or 2 U.S.C. §2a(c) is to the contrary. The district court's unprecedented determination that this reassignment of congressional redistricting authority is consistent with the Elections Clause cannot stand.

A. The Text of the Elections Clause Unambiguously Vests State Authority to Prescribe the Times, Places, and Manner of Congressional Elections in the State's Representative Lawmaking Body Alone.

Unlike the federal government, which may exercise only limited and enumerated powers, the States generally enjoy residual sovereignty and may exercise nearly plenary authority often referred to as police powers. But the States' residual sovereignty does not allow States to prescribe regulations for federal elections. Because the offices of United States Representative and Senator "aris[e] from the Constitution itself," the "powers over the election of

federal officers had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995).

The Elections Clause is thus an "express delegation[] of power to the States to act with respect to federal elections," *id.* at 805, including the adoption of congressional districts. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 5-6 (1964). "Through the Elections Clause, the Constitution delegated to the States the power to regulate the 'Times, Places and Manner of holding Elections for Senators and Representatives,' subject to a grant of authority to Congress to 'make or alter such Regulations.'" *Cook v. Gralike*, 531 U.S. 510, 522 (2001); *see also Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (explaining that Clause "invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices"); *Foster v. Love*, 522 U.S. 67, 69 (1997). States must ground their authority to prescribe regulations for federal elections in the Elections Clause or those laws are simply ultra vires. States lack inherent authority to regulate federal elections, and "[n]o other constitutional provision [beyond the Elections Clause] gives the States authority over congressional elections." *Cook*, 531 U.S. at 522-23.

The Framers did not simply delegate this authority to the "States" *qua* States. Rather, in "clear and explicit" language, *Puerto Rico v. Branstad*, 483 U.S. 219, 226-27 (1987) (quoting *Michigan v. Doran*, 439 U.S. 282, 286 (1978)), they placed this responsibility in one particular state entity: "the

Legislature thereof." U.S. Const. art. I, §4, cl. 1. The term "the Legislature" is "plain, and admits of no doubt in its interpretation." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). It "was not a term of uncertain meaning when incorporated into the Constitution," and "[w]hat it meant when adopted it still means": "the representative body which made the laws of the people." *Id.*; *see also Smiley v. Holm*, 285 U.S. 355, 365 (1932).

The Framers' use of the term "the Legislature" is "explicit and unambiguous." *INS v. Chadha*, 462 U.S. 919, 945 (1983). It "produces no impression of doubt as to the meaning." *Lake Cnty. v. Rollins*, 130 U.S. 662, 670 (1889). What it means now is what it has always meant: "'the representative body which made the laws of the people.'" *Smiley*, 285 U.S. at 365 (quoting *Hawke*, 253 U.S. at 227). And in the context of the Elections Clause, it means that representative body "in each State"—*viz.*, the state legislature. Because the "text of [this] constitutional provision is not ambiguous," there is no basis or need for "search[ing] for its meaning beyond the instrument." *Lake Cnty.*, 130 U.S. at 670. As Justice Holmes aptly observed for the Court, "Courts cannot go very far against the literal meaning and plain intent of a constitutional text." *Forbes Pioneer Boat Line v. Board of Comm'rs of Everglades Drainage Dist.*, 258 U.S. 338, 340 (1922).

Moreover, there can be no doubt that the Framers "clearly understood and carefully used" the term "the Legislature" in the Elections Clause to mean "the representative body which made the laws of the people." *Hawke*, 253 U.S. at 227-28. The Framers well

understood the difference between States generally and "the Legislature[s] thereof." *Cf.*, *e.g.*, U.S. Const. art. I, §10 (enumerating various authorities that "No State" may exercise). The Framers equally understood the difference between those representative bodies and the people. *Cf.*, *e.g.*, *id.* amends. II & IV (protecting certain rights of "the people"). And the Framers knew the difference between "state legislatures" and the "executive and judicial" branches "of the several States." *Id.* art. VI, cl. 3. Those contemporary understandings and usages are critical. *See Utah v. Evans*, 536 U.S. 452, 475 (2002) (looking to "[c]ontemporaneous general usage" when construing term in Constitution).

The Framers reflected these well-understood distinctions in their writings and in the Constitution itself. For example, John Adams wrote, "[W]ho are the legislatures of these separate states? Are they the people? No. They are a selection of the *best men* among the people, made by the people themselves." Letter from John Adams to John Taylor (Apr. 15, 1814), *in* 6 *The Works of John Adams* 443, 472 (Charles Francis Adams ed., 1851) (emphasis in original). Alexander Hamilton described "the State legislatures" as "select bodies of men." The Federalist No. 27, at 170 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (hereinafter The Federalist). And he admonished that "there should be great care to distinguish the people of Virginia from their Legislature." Letter from Alexander Hamilton to Theodore Sedgwick (Feb. 2, 1799), *in* 10 *The Works of Alexander Hamilton* 340, 340-41 (Henry Cabot Lodge ed., 1904).

Even more significant, throughout the Constitution the Framers carefully employed particular terminology in describing and assigning rights, duties, and functions among various State-level individuals and entities. Thus, the "People of the several States" choose the members of the House of Representatives. U.S. Const. art. I, §2, cl. 1. The state "Legislature" regulates congressional elections, *id.* §4, cl. 1; consents to Congress' purchase of State land, *id.* §8, cl. 17; directs the manner of appointment of presidential electors, *id.* art. II, §1, cl. 2; consents to the joining of two States, *id.* art. IV, §3, cl. 1; applies for constitutional amendments, *id.* art. V; and ratifies constitutional amendments, *id.* The "Executive Authority" in the State issues writs of election to fill vacancies in the House, *id.* art. I, §2, cl. 4; appoints Senators if a vacancy occurs while the Legislature is in recess, *id.* §3, cl. 2; and demands extradition, *id.* art. IV, §2, cl. 2. "Judges in every State" are bound by the Supremacy Clause. *Id.* art. VI, cl. 2. And the Constitution equally reflects that the Framers knew how to refer to States *qua* States and to grant or deny powers to all authorities within a State. *See id.* art. I, §10, cl. 1-3.

This precise division of labor among the people and the various branches of state government—with other obligations left to the "State" generally—leaves no doubt that the Elections Clause's delegation of authority to "prescribe[] ... Regulations" regarding congressional elections to "the Legislature," *id.* §4, is to that body alone and was not a general delegation to the States to prescribe regulations by whatever means they found convenient. Had the Framers wished to vest the authority to prescribe federal election

regulations in the people, or the Executive, or the "State" more generally, they clearly knew how to do so. *See Hawke*, 253 U.S. at 228 ("When [the Framers] intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose."). But they clearly and deliberately assigned this responsibility to "the Legislature."

The importance of honoring the Framers' deliberate choices about where to delegate important federal authority is self-evident. But the significance of such specific delegations is confirmed by the later ratification of the Seventeenth Amendment, which reassigned the selection of Senators of a State from "the Legislature thereof" to "the people thereof." *Compare* U.S. Const. art. I, §3, cl. 1, *with id.* amend. XVII. Unless the Seventeenth Amendment is to be regarded as an unnecessary gesture, the change worked by its provisions shows that it is not possible to treat a constitutional delegation of authority to "the Legislature" as synonymous with a delegation to the State to accomplish a constitutional objective by means of its own choosing. If the two were the same, a State wishing to provide for popular election of Senators before the Seventeenth Amendment would have *already* had the authority to do so. But a state law directly providing for popular election of Senators would have been manifestly unconstitutional before the Seventeenth Amendment. *See Hawke*, 253 U.S. at 228 ("The necessity of the [Seventeenth] amendment to accomplish the purpose of popular election is shown in the adoption of the amendment."). A present-day state law purporting to divest the Legislature of its

constitutional authority over congressional redistricting should fare no better.

Furthermore, the nature of the delegation by the Framers—one of specified authority over *federal* "Elections for Senators and Representatives"—accentuates why "the Legislature" must carry out its role as the component of state government authorized to prescribe the necessary regulations, including those for congressional redistricting. As explained, because congressional offices are distinctly federal and did not predate the Constitution, the power to regulate congressional elections was delegated to, not reserved by, the States. *U.S. Term Limits*, 514 U.S. at 804-05. Given that the Framers need not have granted the States any power at all over congressional elections, it is especially important that the limits on their grant of power be strictly observed.

Here, when the Framers specified that the times, places, and manner of congressional elections "shall be prescribed in each State by the Legislature thereof," they granted initial authority to the States but explicitly narrowed that grant of power by making it subject to a particular condition: that the Legislature exercise it. The Framers carried out the federal-state division of responsibility for regulating congressional elections by means of the phrase "shall be prescribed in each State," and then added the phrase "by the Legislature thereof" to identify the particular state body that must do the "prescrib[ing] in each State"—the State's representative lawmaking body. When a State exercises the broad grant of authority but ignores the limiting condition, it arrogates to itself more power than the Framers extended. And it

renders the constitutional text describing *who* does the "prescrib[ing] in each State"—the "Legislature thereof"—entirely superfluous.

Finally, the relationship between the two subclauses underscores the logic of the Framers' decision to delegate this authority to state legislatures in particular. The Elections Clause first delegates the initial authority to prescribe regulations about the times, places, and manner of congressional elections to the state legislatures. The Elections Clause then makes clear that the federal Congress has the ultimate authority to "by Law make or alter such regulations." The Framers viewed both the authority to prescribe regulations for congressional elections and the power to revise those regulations as inherently legislative tasks. It thus made sense for the Framers to give the initial authority to prescribe such regulations to the same kind of lawmaking body (*viz.*, the state legislature) as the lawmaking body with the ultimate authority to revise those regulations (*viz.*, the Congress).

B. Vesting State Authority to Prescribe the Times, Places, and Manner of Congressional Elections in the State's Representative Lawmaking Body Alone Comports With the Historical Record.

The Framers' decision to vest State-level authority to prescribe the times, places, and manner of congressional elections in "the Legislature" alone is no accident. Rather, it is consistent with the Framers' admiration for representative democracy and skepticism for other forms of government, including direct democracy. And it makes particular sense given

the significance and nature of the federal power over congressional elections that the Framers were partially ceding in the Elections Clause.

The Framers lauded representative democracy and viewed it as an important improvement over direct democracy. For example, while granting that "the people are the only legitimate fountain of power," The Federalist No. 49, at 310, James Madison believed that "pure democracy" results in "spectacles of turbulence and contention" that "can admit of no cure for the mischiefs of faction," The Federalist No. 10, at 76. Indeed, Madison went so far as to contend that "[h]ad every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." The Federalist No. 55, at 340. By contrast, in Madison's view, a republic—which he defined as "a government in which the scheme of representation takes place"—"refine[s] and enlarge[s] the public views, by passing them through the medium of a chosen body of citizens," and it facilitates governance of a "greater number of citizens and extent of territory," thereby lessening the risk of "factious combinations." The Federalist No. 10, at 76-78.

Madison's views were hardly idiosyncratic. At the Constitutional Convention, Alexander Hamilton lauded the virtues of "republican government," remarking, "Real liberty is never found in despotism or the extremes of democracy." Speeches in the Federal Convention (June 18, 1787), *in* 1 *The Works of Alexander Hamilton* 381, 411 (Henry Cabot Lodge ed., 1904). John Adams deemed it a "fixed principle" that "all good government is and must be republican." Letter from John Adams to Samuel Adams (Oct. 18,

1790), *in* 6 *The Works of John Adams* at 414, 415. By contrast, he observed that "democracy never lasts long," for it "soon wastes, exhausts, and murders itself." Letter from John Adams to John Taylor (Apr. 15, 1814), *in* 6 *The Works of John Adams* at 443, 484. Chief Justice John Marshall observed that the difference "between a balanced republic and democracy ... is like that between order and chaos." John Marshall, *The Life of George Washington* 467 (Robert Faulkner & Paul Carrese eds., 2000).

Given the Framers' devotion to representative democracy, it would be ahistorical to construe their choice of the term "the Legislature" in the Elections Clause as anything but a deliberate choice of that representative body. *See Reynolds v. Sims*, 377 U.S. 533, 564 (1964) (observing that "[s]tate legislatures are, historically, the fountainhead of representative government in this country"). That conclusion is bolstered by the particular concerns that gave rise to the balance reflected in the Clause. The Framers acknowledged that "a discretionary power over elections ought to exist somewhere," The Federalist No. 59, at 360 (Alexander Hamilton), and understood the value of giving those "best acquainted with the situation" where the elections would actually take place some partial agency in prescribing regulations, James Madison, *Debate in Virginia Ratifying Convention*, *in* 2 *The Founders' Constitution* 268 (Philip B. Kurland & Ralph Lerner eds., 1987). At the same time, the Framers were acutely concerned that simply delegating authority over federal elections to the States could result in the "annihilat[ion]" of the federal government. The Federalist No. 59, at 360-61. Leaving "exclusive power of regulating elections for

the national government, in the hands of the State legislatures," would "leave the existence of the Union entirely at their mercy." *Id.* at 361.

The Framers' solution to this conundrum was the same as their answer to many other constitutional difficulties—a system of separated powers and checks and balances. The Elections Clause gives primary authority over federal election regulations to state legislatures, but ultimate authority to the federal government. *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2253.

The Framers do not appear to have ever seriously considered giving the primary authority over congressional election regulations to any component of state government other than the state legislatures, nor does it appear that a general delegation to the State itself was ever contemplated. *See* The Federalist No. 59, at 360 ("[T]here were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former."). As noted, both subclauses underscore the Framers' view that prescribing regulations concerning the times, places, and manner of congressional elections was an exercise of legislative authority. Moreover, ratification debates concerning the Elections Clause clearly focused on the role and representative character of state legislatures, as opposed to state authority generically, by considering the role of state legislatures over election regulations in light of their pre-Seventeenth Amendment authority to appoint Senators. *See, e.g., id.* at 362

(concluding "that the national government would run a much greater risk" from an unchecked authority of "State legislatures over the elections of its House of Representatives than from their power of appointing the Members of its Senate"). In all events, given the Framers' concerns about putting States in a position to undermine the very "existence of the Union" by either refusing to prescribe congressional election regulations or prescribing imprudent ones, it strains credulity to think that they would have been comfortable putting that discretion in the hands of unelected bodies or the people directly.[6]

There were, of course, critics of the powers being concentrated in the new federal Congress who would have preferred that the state legislatures be given the authority over congressional elections without the possibility of a congressional override. Madison responded to those critics by emphasizing the similar republican virtues in the state legislatures and the federal Congress. He explained that there was no reason to fear a federal Congress that (before the Seventeenth Amendment) consisted of Senators "chosen by the States Legislatures" and "Representatives elected by the same people who elect the State Legislatures." In both cases, Madison reasoned, "if confidence is due to the latter, it must be due to the former." *Records of the Federal Convention*,

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[6] Of course, States may provide for their own direct-democracy measures, such as initiatives and referenda. But in determining whether the Framers intended for the term "the Legislature" in the Elections Clause to encompass something beyond a State's representative lawmaking body, the historical evidence answers this question in the negative.

in 2 *The Founders' Constitution* at 249. In short, allowing the state legislatures to be divested of their authority to prescribe regulations for congressional elections ignores not only the plain text of the Constitution, but also (not surprisingly) the clearly expressed views of the Framers.

C. Arizona's Use of the IRC to Adopt Congressional Districts Violates the Elections Clause Because It Completely Divests the Legislature's Authority to Prescribe Congressional Districts.

The plain text and history of the Elections Clause make clear that the Elections Clause does not permit Arizona's use of the IRC to adopt congressional districts. The IRC is not "the Legislature thereof," *i.e.*, the Arizona State Legislature, and yet it is plainly prescribing regulations for congressional elections. The differences between the Legislature and the IRC are legion. The IRC has no general lawmaking power; it exists solely to "establish congressional and legislative districts." Ariz. Const. art. IV, pt. 2, §1(14). Once it completes redistricting, it "shall not meet" except to "revise districts if required by court decisions" or the number of districts changes. *Id.* §1(23). IRC members are chosen not from the general populace but from a 25-person pool established by the state Commission on Appellate Court Appointments. *Id.* §1(5). They are not elected by the people; indeed, no member of the Legislature—or any holder of or candidate for *any* public office (except school board) in the preceding three years—can serve as an IRC member. *Id.* §1(3),(13). Their terms typically run for approximately ten years. *See id.* §1(23). Once

selected, they can be removed by the Governor, with two-thirds concurrence of the Senate, only for gross misconduct, substantial neglect of duty, or inability to discharge the duties of the office. *Id.* §1(10).[7]

The redistricting maps that the IRC creates are "final" and certified to the Secretary of State once complete. *Id.* §1(16)-(17). The maps are not subject to revision or rejection by the Legislature, the Governor, or the people. Indeed, the Legislature cannot enact any measure that eliminates or adversely affects the provisions establishing and authorizing the use of the IRC, or that diverts funds from the IRC. *See id.* art. IV, pt. 1, §1(1), (3)-(4), (6)(B)-(D). The IRC is as insulated from the ordinary political process as practicable. *See Arizona Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1273 (Ariz. 2012) (recognizing that "the constitutional provisions creating and governing the IRC ... were designed to *remove* redistricting from the political process by extracting this authority from the legislature and governor"). Indeed, the IRC's very name proclaims its independence from the Legislature and any other source of influence.

And while the IRC is plainly not the Legislature and is structured to look and operate nothing like the

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[7] In practice, these standards pose an extraordinary barrier to removal of a member. In 2011, Arizona's Governor removed the IRC chair with two-thirds concurrence of the Senate, but the Arizona Supreme Court ordered the chair reinstated. *See Arizona Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1278 (Ariz. 2012). The court held that removal requires the "categorical and egregious" failure to perform a duty or "a willful act of omission that the commissioner knew or should have known was wrong or unlawful." *Id.* at 1276.

Legislature, the *actual* Legislature has been cut out of the redistricting process entirely, as the purpose, text, and effect of Proposition 106 make clear. The initiative's authors expressly stated that it would "take[] the redistricting power away from the Arizona Legislature." J.A.17-18. The official ballot provided that voting for the initiative meant "removing redistricting authority from the Arizona Legislature." J.A.80. In the district court, the IRC argued that the Legislature seeks to "take back the power to draw congressional districts." Defs.' Mot. to Dismiss 2, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 02-1211 (D. Ariz. Aug. 10, 2012) (Dkt. 16). The initiative's authors, participating as *amici*, asserted that "Proposition 106 was intended to remove responsibility for redistricting from the Arizona Legislature." Br. of Amici Curiae 3, *Ariz. State Legislature*, *supra* (Dec. 19, 2013) (Dkt. 42). The majority below found that this goal was achieved: the initiative "removed congressional redistricting authority from the Legislature." Pet.App.3.

The majority below did suggest that the Legislature has not been "entirely divested" of redistricting authority because it "retains the right to select the IRC commissioners, and the IRC is required to consider the Legislature's suggested modifications to the draft maps." Pet.App.19 n.4. The IRC did not defend this reasoning in its motion to dismiss or affirm before this Court, and with good reason. As Judge Rosenblatt correctly observed in dissent, these "minor procedural influences must be evaluated in light of the fact that" IRC members are chosen "from a list selected not by [the Legislature] but by the state's commission on appellate court appointments," and the

fact that "the IRC has the complete discretion not to implement any map changes suggested by" the Legislature. Pet.App.23. Indeed, every concerned citizen has the same opportunity to recommend congressional districts, and the IRC has complete discretion to discard recommendations from any external source. The usurpation is complete.[8]

Certainly, neither of the two features identified by the majority remotely preserves for the Legislature what the Elections Clause gives to the Legislature alone: the authority to "prescribe[] ... Regulations" concerning the times, places, and manner of congressional elections. To "prescribe" is to "dictate, ordain, or direct; to establish authoritatively (as a rule or guideline)." *Black's Law Dictionary* 1302 (9th ed. 2009). Founding-era dictionaries provide substantially the same definition. *See, e.g.*, Noah Webster, *An American Dictionary of the English Language* (1828) ("To set or lay down authoritatively for direction; to give as a rule of conduct; as, to *prescribe* laws or rules."); Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792) ("To set down authoritatively; to order; to direct."); *see also Smiley*, 285 U.S. at 366 (stating that Elections Clause grants state legislatures authority "*to enact the numerous requirements* as to procedure and safeguards" (emphasis added)). The ability to provide

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[8] Contrary to the majority's assertion, moreover, the "Legislature" does not select the IRC members. Instead, the majority and minority leaders from each chamber select four members from a pool preselected by the Commission on Appellate Court Appointments, and those four members select the critical fifth member to serve as chair.

nonbinding comments—*i.e.*, the ability to recommend—is hardly the power to prescribe, and the power to influence membership—*i.e.*, the ability to appoint—is even further removed from the power to prescribe the content of the regulations. As Judge Rosenblatt aptly put it, the Legislature has been divested of "any outcome-defining effect on the congressional redistricting process." Pet.App.23.

In the district court and again in its motion to dismiss or affirm, the IRC advanced an alternative argument why the Legislature has not been completely divested of authority to prescribe redistricting maps: the Legislature supposedly "retains the power to pass a redistricting plan and refer it to the voters for approval." All three judges below understandably ignored—and implicitly rejected—this erroneous claim. While such a residual, indirect role for the Legislature would still be inconsistent with the Elections Clause's delegation of "prescrib[ing]" authority to the Legislature, there is no such residual authority in Arizona. The two Arizona constitutional provisions that the IRC cited for this proposition—art. XXI, §1 and art. IV, pt. 1, §1(15)—do not support the premise. Article XXI, §1 simply allows the Legislature to submit proposed constitutional amendments to a vote of the people. No one would say that the federal Congress has the power to pass ex post facto laws, levy unenumerated direct taxes, or grant titles of nobility simply because it has the authority to propose amendments to the United States Constitution eliminating the express constitutional prohibitions on such laws. It is equally absurd to suggest that the Arizona Legislature's ability to propose constitutional amendments gives it the

authority to prescribe regulations for congressional elections in the wake of Proposition 106.

The IRC's argument concerning art. IV, pt. 1, §1(15) is even more of a reach. That provision was added to the Arizona Constitution as part of a set of changes aimed at *reducing* the Legislature's ability to alter voter-approved laws. The provision is merely a savings clause generally stating that "this section" (*i.e.*, section 1) does not otherwise limit the Legislature's ability to submit referendum measures to the people. But section 1 also specifically bars the Legislature from "adopt[ing] any measure that supersedes, in whole or in part," an initiative if it does not "further[] the purposes" of the initiative. *Id.* §1(14). That prohibition amply encompasses the hypothetical the IRC posits—a Legislature-drawn map submitted to the voters intended to supplant the map drawn by the IRC.

In short, the Legislature has been completely divested of its constitutionally-conferred power to adopt congressional districts. Arizona law does not simply "provide some general guidance to the legislature regarding the exercise of its redistricting power." *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1280 (11th Cir. 2012) (upholding initiative measure establishing standards legislature must follow when redistricting). Instead, it "eviscerate[s]" the Legislature's "constitutionally delegated power" and "exclude[s] the legislature from the redistricting process." *Id.* For good reason, then, the creation and use of the IRC has been fairly described as the "most radical[] ... departure[] from the traditional legislative redistricting model." Bruce E. Cain, *Redistricting*

Commissions: A Better Political Buffer?, 121 Yale L.J. 1808, 1811-12 (2012). Whatever the policy merits of this novel approach to congressional redistricting, it is wholly at odds with the Elections Clause. The Framers deliberately vested State-level responsibility over congressional elections in the state legislature. Arizona is free to experiment with other modes of prescribing election regulations when it comes to its own elections. But when it comes to congressional elections, Arizona's only authority comes from the Elections Clause and must be consistent with its text. The complete ouster of the Legislature's authority to undertake congressional redistricting cannot be squared with that text and should be rejected.

D. No Decision of This Court Supports the Complete Divestment of a State Legislature's Authority to Prescribe Congressional Districts.

1. Until the divided decision below, no court, much less this Court, had ever held that a state legislature may be permanently displaced as the entity responsible for congressional redistricting. The district court majority reached that unprecedented outcome largely by relying on this Court's decisions in *Hildebrant* and *Smiley*. But those decisions do not support the IRC, much less the far-reaching proposition that a State can erect a specialized "independent" alternative process for congressional redistricting that permanently ousts "the Legislature" from the role assigned to it by the Elections Clause.

In *Hildebrant*, the Ohio legislature had passed, and the governor had signed, a law redistricting the State for the purpose of congressional elections. 241

U.S. at 566. Pursuant to the general Ohio process for making law, the redistricting law was subsequently rejected by popular referendum, in what amounts to a veto or override by referendum. *Id.* Suit was brought to void the referendum on the theory that "the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void." 241 U.S. at 567.

This Court affirmed the Ohio Supreme Court's dismissal of the suit. The Court characterized the constitutional question as whether "includ[ing] the referendum within state legislative power for the purpose of apportionment" violates the Constitution. *Id.* at 569. The Court held that any such claim rests upon the premise that a referendum "causes a state ... to be not republican in form" in violation of the Guarantee Clause of the Constitution, U.S. Const. art. IV, §4, and, according to the Court, challenges under the Guarantee Clause are nonjusticiable. 241 U.S. at 569-70. The Court also observed that incorporating the possibility of an override-by-referendum into the general legislative process does not run afoul of the Elections Clause or a precursor to 2 U.S.C. §2a(c). *See id.* at 568 (stating that including referendum as "part of the legislative power" does not violate statute); *id.* at 569 (acknowledging argument that "includ[ing] the referendum within state legislative power ... is repugnant to" the Elections Clause, and deeming argument "plainly without substance").

In *Smiley*, the Minnesota state legislature passed a law adopting new congressional districts, which the governor then vetoed. Despite the veto, the legislature

nevertheless registered the new map with the secretary of state. 285 U.S. at 361. Suit was brought to void the map given the governor's veto. *Id.* at 362. The Minnesota Supreme Court rejected that suit, holding that in prescribing redistricting measures pursuant to the Elections Clause, a state legislature is "not acting strictly in the exercise of the lawmaking power, but merely as an agency, discharging a particular duty in the manner which the Federal Constitution required." *Id.* at 364. Thus, the state court concluded, "the Governor's veto has no relation to such matters." *Id.* (quotation marks omitted).

This Court reversed, finding "no suggestion" in the Elections Clause "of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 367-68. Thus, if the general lawmaking process in Minnesota included a gubernatorial veto, that "check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority" in the Elections Clause. *Id.* at 368.

For several reasons, *Hildebrant* and *Smiley* do not aid the IRC. First, both decisions clearly contemplate a continuing role—indeed, a continuing, preeminent role—for the state legislature in prescribing congressional districts. In *Hildebrant*, the challenged referendum was "a *component part* of the legislative authority empowered to deal with" congressional redistricting, 241 U.S. at 567 (emphasis added)—not, as here, a complete displacement of that authority. Indeed, the result of the referendum at issue was simply to return the congressional districts to those

enacted two years earlier by the Ohio legislature. *See State ex rel. Davis v. Hildebrant*, 114 N.E. 55, 59 (Ohio 1916). After the referendum, the legislature retained the power to draw congressional district lines, subject, like any other legislative act, only to a gubernatorial veto or override-by-referendum. Likewise, in *Smiley*, the redistricting measure at issue had been enacted by the Minnesota state legislature. The governor's veto simply sent the matter back to the legislature to start the process anew.

Here, by contrast, the Arizona State Legislature has been completely stripped of its authority to prescribe redistricting maps. It is completely and permanently cut out of the redistricting process—as is the Governor, for good measure. The IRC does not merely have the power to reject Legislature-approved redistricting maps and return the task to the Legislature. Rather, it has absolute power to create, finalize, and certify redistricting maps. Nothing in *Hildebrant* and *Smiley* remotely supports this complete and permanent re-delegation of authority to prescribe regulations from the entity selected by the Framers—*viz.*, the state legislatures—to a different entity.

Second, there is a fundamental difference between the claims brought in *Hildebrant* and *Smiley* and the claim brought here. Those cases sought a special exception from the ordinary legislative process for laws dealing with congressional elections. The argument was that even if other laws are subject to gubernatorial veto or override-by-referendum, regulations prescribed under the Elections Clause are different because the Constitution delegated that

authority to the state legislatures alone, to the exclusion of the Governor or the referendum process. This Court quite understandably rejected that plea for a special exemption from the general legislative process, since the request rested on the proposition that state legislatures are doing something other than legislating when they prescribe regulations for congressional elections.

But rejecting the suggestion that state legislatures are freed from the general constraints of the legislative process, like the gubernatorial veto, does not remotely suggest that States can erect a special process for prescribing electoral regulations and cut the state legislature out of that process. The IRC is not some general constraint on the ordinary legislative process, but a specialized agency expressly designed to exercise the redistricting power, and that power alone, to the exclusion of the state legislature. Unlike anything at issue in *Hildebrant* and *Smiley*, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). It is one thing to reject a special exemption that treats congressional election regulations as something other than legislation and quite another matter to bless a specialized regime that removes electoral regulations from the ordinary legislative process in which the legislature plays the central role.

Indeed, if anything, *Hildebrant* and *Smiley* affirmatively undermine the IRC's argument. By reaffirming that the Framers intended state legislatures to prescribe regulations for congressional elections through the normal legislative process, those cases undermine the premise of the IRC, which is that

redistricting is something that should be exempted from the ordinary legislative process and given to a specialized, independent commission. Of course, Arizona is free to make a contrary judgment for its own elections. But when it comes to congressional elections, the Constitution and this Court's cases make clear that the state legislature, subject to generally applicable constraints in the ordinary legislative process, is the body that is to prescribe electoral regulations.

2. To conclude otherwise—to hold that "the Legislature" in the Elections Clause means "the legislative process," in the sense of any "appropriate exercise of state law," Pet.App.17—is problematic on many levels. First, it requires a departure from the plain and natural meaning of the term "the Legislature." "'[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columba v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). The "enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824); *see also, e.g.*, *NFIB v. Sebelius*, 132 S. Ct. 2566, 2586 (2012). As this Court has acknowledged—and the Framers themselves understood, *see* pp. 26-27, *supra*—the "natural" meaning of the term "the Legislature" is "the representative body which ma[kes] the law of the people." *Smiley*, 285 U.S. at 365; *Hawke*, 253 U.S. at 227. States may make laws through other means, be

it by popular initiative, agency promulgation, executive fiat, or common law judicial reasoning, but that hardly makes any "appropriate exercise of state law," or even the "legislative process," coterminous with "the Legislature."

Second, a contrary determination results in a circular, limitless, and ultimately meaningless conception of the term "the Legislature" and the Elections Clause as a whole. Indeed, this case demonstrates the point. The IRC has argued that its adoption of congressional districts is consistent with the Elections Clause because the Arizona Supreme Court has held that the IRC "'acts as a legislative body.'" Mot. to Dismiss or Affirm 9-10 (June 30, 2014) (quoting *Ariz. Minority Coal. For Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 684 (Ariz. 2009)). But the Arizona Supreme Court held that the IRC "acts a legislative body" because, in its view, "'redistricting is ... a legislative task.'" 208 P.3d at 684 (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978)).

The Framers surely agreed with the latter proposition, which is why they delegated the initial authority to prescribe regulations for congressional elections to state legislatures subject to alteration by the federal legislature. In other words, it is precisely because congressional redistricting is "a legislative task" that the Constitution assigns that task to legislatures. Thus, the argument that this legislative power can be delegated to any entity under the sun because any recipient will be engaged in a legislative task is to get matters exactly backwards. It is also entirely circular and limitless. Under the IRC's

reasoning, it is "the Legislature" for purposes of redistricting under the Elections Clause because it is "a legislative body," and it is "a legislative body" because it engages in redistricting. Voila. The reasoning is limitless: *any* entity that undertakes redistricting—whether the people, judges, the governor, or even a single, unelected redistricting "czar"—satisfies the Elections Clause, because it undertakes redistricting.[9] And the logic is hardly limited to redistricting, as any prescription of the regulations concerning the times, places, and manner of congressional elections is just as surely a legislative task. The Elections Clause prevents this dangerous tautology by vesting congressional redistricting authority in "the Legislature," not "a legislative body" so defined by the very task it is undertaking.

The IRC's position conflicts with not just the constitutional language chosen by the Framers but also the very notion of representative government that they lauded. Assigning the task of redistricting to "the Legislature" ensures that all citizens, through their elected representatives, have a voice in the inherently political task of redistricting. *See Gaffney v. Cummings*, 412 U.S. 735, 749, 753 (1973) (observing that redistricting is "primarily a political and legislative process," and "[p]olitics and political considerations are inseparable from districting and apportionment"). But the IRC is chosen by party leaders of the two majority parties and consists, in

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[9] Indeed, because in practice the IRC is comprised of two Democrats, two Republicans, and one independent who serves as chair, the chair in effect serves as the redistricting "czar" when ideological differences inevitably divide the other members.

practice, of two Democrats, two Republicans, and one "independent." At the time of the Framing, the state legislatures were largely nonpartisan; within a few years, they were divided among Federalists, Democratic-Republicans, and later Whigs; today, they might include a few Greens and Libertarians; and no one can confidently predict what is next. The only guarantee is that the state legislatures will reflect whatever lies next through the very principles of representative democracy the Framers held dear. The IRC, by contrast, appears to lock in the majority parties and create a powerful role for one, but only one, "independent." *Cf. Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (enjoining state electoral law "favor[ing] two particular parties—the Republicans and the Democrats" over "[n]ew parties"). And even that is just the composition of this particular commission. There is no reason in logic that a narrow majority of a State's voters could not enact an initiative permanently placing redistricting power in the hands of an unelected commission comprised entirely of members of one political party. Once it is accepted that "the Legislature" means anything that passes muster under state law, rather than the elected representatives of all the people in the State, the sky is the limit.

Third, the IRC's view of itself as "the Legislature" under the Elections Clause—essential to its argument—leads to both textual and conceptual incongruities. Because the IRC cannot deny that the Arizona Legislature is itself a legislature, the most that the IRC can argue on its own behalf is that it is "*a* Legislature," not the sole one. But, as a textual argument, that theory is notably incomplete given

that the Elections Clause confers authority on "*the* Legislature" of a State, not just "*a* Legislature." *See Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) (emphasizing the "use of the definite article"). By contrast, the Legislature's argument fits squarely with the relevant language because it regards the Arizona Legislature as the only Legislature in Arizona. Furthermore, the very notion that States are imbued with multiple legislatures at a single time is fanciful even now, and certainly would have been seen as such by the Framers. Thus, while it seems plain that the IRC is not "a Legislature" at all, it seems plainer still that it is not "the Legislature" in Arizona.

3. The district court also cited this Court's decisions in *Growe v. Emison*, 507 U.S. 25 (1993), and *Scott v. Germano*, 381 U.S. 407 (1965) (per curiam), which it viewed as "reaffirm[ing] that a state can place the redistricting function in state bodies other than the legislature." Pet.App.10; *see also* Pet.App.15-16. In its motion to dismiss or affirm, the IRC did not defend this reasoning, and rightly so, for the majority grossly misread those decisions.

Growe and *Scott* are part of a line of decisions by this Court holding that courts, including state courts, may step in to *remedy* unlawful districting maps drawn by a state legislature or, as a last resort, draw *temporary*, lawful districting maps if a state legislature fails to do so in a timely fashion. That is a far cry from approving a permanent re-delegation of the legislative task of redistricting to the state courts, and these cases do not remotely stand for that proposition. Quite the opposite: they firmly establishes that "primary responsibility" for

redistricting "rests with the legislature itself." *Tawes*, 377 U.S. at 676; *see also White v. Weiser*, 412 U.S. 783, 795 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment."). Judicial relief is "appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds*, 377 U.S. at 586; *see also Tawes*, 377 U.S. at 676 (allowing Maryland courts to "take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so"); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977) (observing that "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework"); *White*, 412 U.S. at 794-95.

Growe and *Scott* comprise an even more specific subset of these decisions. They hold that judicial relief by a *federal* court is appropriate only once the state legislature *and* state courts fail to execute these duties. *See Growe*, 507 U.S. at 34; *Scott*, 381 U.S. at 409; *see also Branch v. Smith*, 538 U.S. 254, 261-62 (2003); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *cf. McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." (citation and quotation marks omitted)).

The majority focused on this Court's statement in *Growe* that reapportionment is "'primarily the duty

and responsibility of the State through its legislature *or other body*, rather than of a federal court.'" Pet.App.16 (quoting 507 U.S. at 34) (emphasis by majority). But properly understood in the context of this Court's remedial-districting cases, the Court's reference to "other body" simply refers to state courts, which may step in when the legislature fails to carry out its duty in a timely fashion. *See also Branch*, 538 U.S. at 272 (referring to "state courts acting pursuant to state legislative authorization in the event of legislative default"). This Court's precedents provide no basis for interpreting that statement to permit any entity other than a court to draw congressional maps—much less that the state legislature may be completely and permanently divested of its redistricting authority. Indeed, those precedents recognize the difficulties of judicial map drawing and emphasize that the state legislature has the "primary responsibility" to conduct redistricting.

E. 2 U.S.C. §2a(c) Does Not Permit the Complete Divestment of a State Legislature's Authority to Prescribe Congressional Districts.

In its order postponing jurisdiction, this Court rephrased the question presented as whether "the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts." As explained, the Elections Clause does not permit Arizona's use of a commission to adopt congressional districts. Nothing in 2 U.S.C. §2a(c) changes the analysis, for numerous reasons.

To begin with, the Legislature brought its claim under the Elections Clause and did not invoke §2a(c). The Legislature has challenged the IRC maps as inconsistent with and unauthorized by the Elections Clause. Thus, §2a(c) is relevant only if it could be read to authorize a permanent ouster of the state legislature from the congressional redistricting process under circumstances that would otherwise violate the Elections Clause. The statute does not remotely purport to authorize any such thing and could not do so consistent with the Constitution. To the contrary, the provision was enacted for a limited purpose, and its role has been narrowed dramatically by this Court.

Consistent with the Framers' concerns that States could frustrate federal objectives by deadlocking in a way that left congressional elections without needed regulations, Congress passed what is now 2 U.S.C. §2a(c) as a gap-filling statute to provide default rules if the state legislatures could not produce a timely redistricting map in the wake of a decennial census. That narrow purpose has nothing to do with the case at hand. Moreover, four-fifths of the default options provided in §2a(c) have been rendered unconstitutional by subsequently-articulated one-person, one-vote principles. So little is left of §2a(c) by these constitutional developments and later statutes that in *Branch v. Smith* this Court divided over whether the provision had been impliedly repealed. Three Justices held that 2 U.S.C. §2a(c) had been repealed. *See* 538 U.S. at 292 (Stevens, J., concurring in the judgment). A plurality of the Court declined to so hold, but only by giving the statute a saving

construction rendering the circumstances in which it applies vanishingly small.

The plurality explained that four out of the five procedures set forth in the statute "have become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional." *Branch*, 538 U.S. at 273 (plurality). It then held that the remaining "flotsam" of 2 U.S.C. §2a(c)—a clause prescribing at-large representation in multi-district States where the number of Representatives has decreased and the number of districts exceeds the number of Representatives, *see id.* §2a(c)(5)—"is inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict pursuant to §2c." *Branch*, 538 U.S. at 275 (plurality). Thus, the plurality explained, 2 U.S.C §2a(c) is "a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one." *Id.* This limiting construction makes clear that 2 U.S.C. §2a(c) has no relevance here, and certainly does not provide a basis for permitting Arizona to oust the State Legislature from the congressional redistricting process.[10]

The IRC has suggested that §2a(c) is relevant here because, by changing the statutory text from "the legislature" in early versions of §2a(c) to "the law thereof' in a predecessor to the current §2a(c), Congress "decided that redistricting may be

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[10] Since 2003, when *Branch* was decided, the circumstances where 2 U.S.C. §2a(c) is applicable have not come to pass.

accomplished however state law dictates, including via ballot measures." Mot. to Dismiss or Affirm 28. But the *Branch* plurality saw no such overhaul. Although it acknowledged the change in language, the plurality appropriately construed this modification as encompassing *judicial* redistricting in remedial circumstances—*i.e.*, where the state legislature has failed to timely enact a constitutional redistricting plan. *See* 538 U.S. at 274. That interpretation is consistent with the Court's longstanding recognition that state legislatures have primary responsibility for redistricting, with state and then federal courts filling in on an interim, remedial basis. *See* pp. 51-53, *supra*.

In short, nothing in 2 U.S.C. §2a(c), especially after *Branch*, has any relevance here. That obscure provision, narrowed by subsequent developments to the brink of irrelevance, does not remotely evince any intent by Congress to authorize States to oust from the congressional redistricting process the very state legislatures to which the Constitution delegates the primary power to prescribe regulations for congressional elections. If Congress ever passed a statute purporting to do so, it would be plainly unconstitutional. The second subclause of the Elections Clause gives Congress the power to override "such regulations" as the state legislatures prescribe and to make its own regulations of those elections. It does not remotely authorize Congress to rewrite the Constitution by authorizing the delegation of the primary authority to prescribe regulations of congressional elections to an entity other than that specified by the Framers in the Constitution. The Framers dismissed as absurd and clearly unconstitutional a comparable Anti-Federalist claim

that the second subclause could be used to extend the terms of Representatives and Senators beyond those specified in the Constitution. *See, e.g., Debate in North Carolina Ratifying Convention, in 2 The Founders' Constitution* at 270-77. And this Court has rejected less aggressive efforts by Congress to rewrite the Constitution. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 421 (1998); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). But there is no need to attribute such an unconstitutional motive to Congress based on the remarkably thin reed of 2 U.S.C. §2a(c). *See, e.g., Branch*, 538 U.S. at 272 (opinion of Court) ("Only when it is utterly unavoidable should we interpret a statute to require an unconstitutional result—and that is far from the situation here."). There will be time enough to address that constitutional question if Congress ever expressly attempts to use its power under the second subclause of the Elections Clause to eviscerate the first subclause. It is sufficient for present purposes to recognize that §2a(c) is not such a law.

* * *

Amidst accounts of bitter redistricting battles within state legislatures, complaints of ideologically stacked and uncompetitively drawn districts, and concerns about diminished confidence in elected officials, there are doubtless those who believe that Arizona's use of the IRC to adopt congressional districts is a welcome "'political invention.'" *INS v. Chadha*, 462 U.S. 919, 945 (1983). To be sure, the "long range political wisdom of this 'invention' is arguable." *Id.* Such commissions "are rarely as independent as claimed," and "may be more dangerous

than legislatures because [they] can mask partisan motives that are easily visible" in legislatures. *Developments in the Law—Voting and Democracy*, 119 Harv. L. Rev. 1165, 1169 (2006). A recent, thorough analysis of such commissions concluded that they "have not eliminated political controversy and partisan suspicions." Cain, *supra*, at 1812. Arizona's use of the IRC is no exception. *See* p. 7, *supra* (citing litigation against IRC-drawn maps); Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 Ariz. St. L.J. 575, 578 (2003) (noting that "[t]he expectation for the [IRC] was that it would be free from partisanship, and thus Arizona would have fairer districts that allowed for competitive elections and that kept communities of interest together," but "the process turned out to be very disappointing for many supporters").

All of this is unsurprising to anyone familiar with this Court's precedents. The Court has repeatedly explained that redistricting is "primarily a political and legislative process," and "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 749, 753 (1973); *see also Perry v. Perez*, 132 S. Ct. 934, 941 (2012) ("[R]edistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment."); *White*, 412 U.S. at 795-96 ("Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task."); *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality) ("The Constitution clearly contemplates districting by political entities, *see* Article I, §4, and

unsurprisingly that turns out to be root-and-branch a matter of politics."). Redistricting "inevitably has and is intended to have substantial political consequences" that will engender heated debate and passionate response regardless of who carries it out. *Gaffney*, 412 U.S. at 753.

But in all events, "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution." *Chadha*, 462 U.S. at 945; *see also U.S. Term Limits*, 514 U.S. at 837; *City of New York*, 524 U.S. at 449 (Kennedy, J., concurring) ("Failure of political will does not justify unconstitutional remedies."). And the Framers had their own decided views about where to place the politically charged authority to "prescribe" regulations concerning the "Times, Places and Manner" of congressional elections, and they enshrined those views in the Elections Clause. Their views reflected their confidence in the republican form of government and concerns about reposing legislative authority in unelected and potentially unrepresentative bodies. The Framers were not so confident in their views that they failed to provide for a mechanism to amend the Constitution. But when the Framers have spoken as clearly to an issue as they did in delegating the primary authority for prescribing regulations for congressional elections to "the Legislature thereof," then the proper resort for those who take issue with the Framers' considered views lies in Article V, not in ignoring the plain terms of Article I, section 4.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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2 U.S.C. §2a

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Ariz. Const. art. IV, pt. 2, §1

§1. Senate; house of representatives; members; special session upon petition of members; congressional and legislative boundaries; citizen commissions

Section 1. (1) The senate shall be composed of one member elected from each of the thirty legislative districts established pursuant to this section.

The house of representatives shall be composed of two members elected from each of the thirty legislative districts established pursuant to this section.

(2) Upon the presentation to the governor of a petition bearing the signatures of not less than two-thirds of the members of each house, requesting a special session of the legislature and designating the date of convening, the governor shall promptly call a special session to assemble on the date specified. At a special session so called the subjects which may be considered by the legislature shall not be limited.

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in

an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

(4) The commission on appellate court appointments shall nominate candidates for appointment to the independent redistricting commission, except that, if a politically balanced commission exists whose members are nominated by the commission on appellate court appointments and whose regular duties relate to the elective process, the commission on appellate court appointments may delegate to such existing commission (hereinafter called the commission on appellate court appointments' designee) the duty of nominating members for the independent redistricting commission, and all other duties assigned to the commission on appellate court appointments in this section.

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest

political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. Each such official shall have a seven-day period in which to make an appointment. Any official who fails to make an appointment within the specified time period will forfeit the appointment privilege. In the event that there are two or more minority parties within the house or the senate, the leader of the largest minority party by statewide party registration shall make the appointment.

(7) Any vacancy in the above four independent redistricting commission positions remaining as of March 1 of a year ending in one shall be filled from the pool of nominees by the commission on appellate court appointments or its designee. The appointing body shall strive for political balance and fairness.

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be

registered with any party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or its designee, striving for political balance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair.

(9) The five commissioners shall then select by majority vote one of their members to serve as vice-chair.

(10) After having been served written notice and provided with an opportunity for a response, a member of the independent redistricting commission may be removed by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

(11) If a commissioner or chair does not complete the term of office for any reason, the commission on appellate court appointments or its designee shall nominate a pool of three candidates within the first thirty days after the vacancy occurs. The nominees shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment, and the appointment other than the chair shall be made by the current holder of the office designated to make the original appointment. The appointment of a new chair shall be made by the remaining commissioners. If the appointment of a replacement commissioner or chair is not made within fourteen days following the presentation of the nominees, the commission on appellate court

appointments or its designee shall make the appointment, striving for political balance and fairness. The newly appointed commissioner shall serve out the remainder of the original term.

(12) Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting commission shall conduct business in meetings open to the public, with 48 or more hours public notice provided.

(13) A commissioner, during the commissioner's term of office and for three years thereafter, shall be ineligible for Arizona public office or for registration as a paid lobbyist.

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

A. Districts shall comply with the United States Constitution and the United States voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;

F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

(16) The independent redistricting commission shall advertise a draft map of congressional districts and a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. Either or both bodies of the legislature may act within this period to make recommendations to the independent redistricting commission by memorial or by minority report, which recommendations shall be considered by the independent redistricting commission. The independent redistricting commission shall then establish final district boundaries.

(17) The provisions regarding this section are self-executing. The independent redistricting commission shall certify to the secretary of state the establishment of congressional and legislative districts.

(18) Upon approval of this amendment, the department of administration or its successor shall make adequate office space available for the independent redistricting commission. The treasurer of the state shall make $6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote.

(19) The independent redistricting commission, with fiscal oversight from the department of administration or its successor, shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(20) The independent redistricting commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the independent redistricting commission. The independent redistricting commission shall have sole authority to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan.

(21) Members of the independent redistricting commission are eligible for reimbursement of expenses pursuant to law, and a member's residence is deemed to be the member's post of duty for purposes of reimbursement of expenses.

(22) Employees of the department of administration or its successor shall not influence or attempt to influence the district-mapping decisions of the independent redistricting commission.

(23) Each commissioner's duties established by this section expire upon the appointment of the first member of the next redistricting commission. The independent redistricting commission shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.

APPELLEE'S BRIEF

No. 13-1314

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FILED
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IN THE

Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEES ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

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QUESTIONS PRESENTED

This Court directed the parties to address the following questions:

1. Do the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts?

2. Does the Arizona Legislature have standing to bring this suit?

PARTIES TO THE PROCEEDINGS

The Plaintiff-Appellant, as listed in the caption, is the Arizona State Legislature.

This brief is filed on behalf of Defendant-Appellees the Arizona Independent Redistricting Commission and Colleen Mathis, Linda J. McNulty, Cid R. Kallen, Scott D. Freeman, and Richard Stertz in their official capacities as members of the Commission. In addition, the Arizona Secretary of State was a Defendant below.

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IN THE

Supreme Court of the United States

No. 13-1314

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEES ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

INTRODUCTION

Partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench another in power—has long been decried as incompatible with fundamental democratic principles. But a solution has been elusive; this Court has not discerned judicially manageable standards to adjudicate claims of unconstitutional gerrymandering, and legislative bodies controlled by dominant political parties have been largely unrestrained in using the redistricting process for partisan advantage. The result has been increased alienation of voters, as the electorate perceives that legislators place their own interests ahead of those of the true sovereigns.

The People of Arizona have refused to despair of an answer to this problem. They have instead exercised their sovereign lawmaking power to address the vice of partisan gerrymandering, just as they might exercise that power to enact any other measure to secure their political or civil liberties, or to promote governmental accountability. The question presented in this case is whether the People are constitutionally prohibited from doing so with respect to congressional districting because the Constitution assigns the obligation to prescribe the "Times, Places and Manner of holding Elections for ... Representatives" in the first instance to each State's "Legislature." U.S. Const. art. I, § 4.

The Constitution does not bar the People from prohibiting partisan gerrymandering, and it does not make state legislatures unassailable citadels of privilege when they engage in such gerrymandering. Appellant's fundamental claim is that, when the People of Arizona exercised their legislative power to assign the authority to draw congressional district lines to a body unlikely to be dominated by self-interested officials, the People "usurped" a legislative power that only their elected representatives may exercise. This usurpation theory is contrary to basic principles of democratic self-rule. Our constitutional democracy was ordained and established by the People and "derive[s] its powers directly from them." *McCulloch* v. *Maryland*, 17 U.S. 316, 404 (1819). The People cannot "usurp" the power of their legislators because the People, and only the People, are "the great source of all power in this country." *Kilbourn* v. *Thompson*, 103 U.S. 168, 192 (1880).

The unspoken premise of Appellant's submission is that there really is no remedy for the abuse of partisan gerrymandering in congressional districts. The courts have declined to provide any redress, and Congress and

state legislatures, dominated by the major political parties, are unlikely to intervene. Now, Appellant says, the People are constitutionally prohibited from implementing a solution, and indeed from reforming any aspect of congressional elections using their own lawmaking power. This Court should not endorse Appellant's depiction of a crippled polity. When the People of Arizona created the Commission through the initiative process "as a basic exercise of their democratic power," *Schuette* v. *Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) (plurality opinion), they adopted a practical means to stop a practice that no one defends and that undermines the People's sense of democratic engagement. The People's decision to do so should be upheld.

STATEMENT

A. The Roots And Rise Of Popular Lawmaking

1. The People of Arizona created the Arizona Independent Redistricting Commission to vest the authority for drawing congressional and legislative districts in an expert lawmaking body. In so doing, they exercised a power that the People in a near-majority of States have reserved to themselves: the power to legislate by ballot initiative and "bypass public officials who [a]re deemed not responsive to the concerns of a majority of voters[.]" *Schuette*, 134 S. Ct. at 1636 (plurality opinion). "[T]he basic premise of the initiative process ... is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government." *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting).

This vision of democracy—that the right and power to make law rest ultimately with the People—stretches

back to the Framers of the Constitution. As James Wilson explained, "[a]ll power is originally in the people; and should be exercised by them in person, if that could be done ... with little difficulty." 2 *The Works of the Honourable James Wilson* 128 (1804); *see also* Federalist No. 22 (Hamilton) ("The streams of national power ought to flow immediately from [the People;] that pure, original fountain of all legitimate authority."). Although the Framers concluded that direct democracy was impracticable for the "compound republic" of the United States, their understanding that lawmaking power resides in the People is reflected in their decision to have the Constitution ratified by the People. *See* Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 203-243 (1996).

A similar vision prevailed in the States from the beginning. For example, Massachusetts' and New Hampshire's constitutions were enacted in the eighteenth century by a direct vote of the People. Indeed, "[m]ost states in the 1800s ... originally adopted their constitutions by popular votes or used the referendum to call for a convention to amend or replace them." Persily, *The Peculiar Geography of Direct Democracy*, 2 Mich. L. & Pol'y Rev. 11, 18 (1997).

In the early twentieth century, the People of several States adopted further mechanisms to exercise lawmaking power. The initiative, which allows the People to enact statutes and constitutional provisions by ballot measure, was adopted as a means "toward the end of removing the corrupting influences which straitjacketed the political system." Persily, *Peculiar Geography*, at 23, 25, 30; *see also* Kang, *De-rigging Elections: Direct Democracy And The Future Of Redistricting Reform*, 84 Wash. U. L. Rev. 667, 700 (2006). Many States also adopted the referendum, which allows

voters to disapprove laws recently passed by the legislature. *See* Persily, *Peculiar Geography*, at 13-14. The initiative and referendum were conceived as means for the People to break the stranglehold of self-interested state legislators; as President Theodore Roosevelt told the Ohio constitutional convention, "the initiative and referendum ... should be used not to destroy representative government, but to correct it whenever it becomes misrepresentative." S. Doc. No. 62-348, at 11 (1912).

South Dakota adopted the initiative in 1898, and Oregon in 1902. Persily, *Peculiar Geography*, at 16. Within two decades, the initiative had spread to nearly twenty States, from California to Maine. *Id.* Congress acknowledged this form of popular lawmaking when it enacted the Apportionment Act of 1911, which established redistricting regulations (now codified at 2 U.S.C. § 2a(c)) making clear that congressional districts established through *any* form of state lawmaking are to be treated as equally valid. *See* Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 14; *infra* pp. 27-30.

B. Arizona's Lawmaking Process

The People of Arizona included the initiative and referendum in their constitution even before joining the Union. Indeed, "[t]he most constant thread running through the Arizona Constitution is its emphasis on democracy, on popular control expressed primarily through the electoral process." Leshy, *The Arizona State Constitution* 14 (2d ed. 2013).

Securing the power of direct lawmaking to the People was "the dominant issue" during the selection of delegates to Arizona's constitutional convention. Leshy, *The Making of the Arizona Constitution*, 20

Ariz. St. L.J. 1, 32 (1988). Support for the initiative and referendum "became the litmus test" for delegate candidates, and by the time the convention formally addressed the issue, "it was already practically a given that these devices would be in the constitution." *Id.* at 32, 46, 63-64; *see also id.* at 62 (at the convention, "every time the question was raised, the delegates opted for more democracy, not less"). The delegates voted to include the initiative and referendum in the Arizona Constitution, allowing "the people to bypass the legislature and the governor, and take lawmaking authority directly into their own hands." *Id.* at 63.

The Arizona Constitution reflects this "enthusiastic embrace" of direct democracy. *See* Leshy, *Making*, 20 Ariz. St. L.J. at 59-60. It allocates the State's "legislative authority" to both the Legislature and the People. Ariz. Const. art. IV pt. 1, § 1, cl. 1; *see also Cave Creek Unified Sch. Dist.* v. *Ducey*, 308 P.3d 1152, 1155 (Ariz. 2013) ("The legislature and electorate 'share lawmaking power under Arizona's system of government.'"). Specifically, "the people reserve the power to propose laws and amendments to the constitution ... independently of the legislature." Ariz. Const. art. IV, pt. 1, § 1, cl. 1. Placing an initiative on the ballot requires only a small percentage of qualified electors' signatures; to take effect, both statutory and constitutional initiatives require only "a majority of the votes cast thereon." *Id.* cls. 2, 5.

The Arizona legislature retains the power to "refer" potential statutory provisions and constitutional amendments to the voters—that is, to draft the text and put the measure on the ballot. Ariz. Const. art. IV,

pt. 1, § 1, cl. 15; *see also id.* art. XXI, § 1.[1] "The Arizona framers deliberately made their handiwork relatively easy to amend," a fact proved by Arizona's history: there have been roughly 150 amendments to the Arizona Constitution in the last hundred years, "more than 80 percent" of which "resulted from legislative referrals rather than direct citizen initiatives." Leshy, *The Arizona State Constitution* 3, 23, 418. The Legislature also "has a better track record with the voters than citizen petitions"—60% of constitutional amendments sponsored by the Legislature have passed, compared to only 42% of those proposed by voters. *Id.* at 23.

C. The Arizona Independent Redistricting Commission

From the beginning, Arizonans used the initiative to effect election-related reform. The same year Arizona became a State, the voters amended its constitution to grant women the right to vote and hold public office. Leshy, *The Arizona State Constitution* 20, 38. This early initiative was followed by measures that prohibited legislators from being appointed to public office, permitted Arizonans to register to vote when applying for a driver's license, and placed limits on campaign

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[1] Until 1998, the Legislature had the power to "repeal or modify a voter-approved law passed by less than a majority of all registered voters." *Cave Creek*, 308 P.3d at 1155. However, "in the wake of unpopular legislative actions designed to nullify voter-initiated measures, voters adopted the Voter Protection Act, a constitutional amendment that flatly prohibits legislative repeal of initiatives ... and that permits legislative amendments only when they 'further the purpose' of the voter-adopted measure and are passed by a super-majority in each house of the Legislature." Bender, *The Arizona Supreme Court and the Arizona Constitution*, 44 Ariz. St. L.J. 439, 445-446 (2012).

contributions.[2] Arizonans have made particular use of the initiative to combat entrenchment and self-interest by the Legislature. Between 1917 and 1972, "[t]he politically sensitive questions of legislative reapportionment and salaries of public officials were the subject of more than a dozen proposed amendments ... about half of which were approved." *Id.* at 39.

In 2000, Arizonans turned to the initiative to confront the problems of partisanship and self-dealing by legislators in drawing congressional and legislative districts.[3] The People enacted Proposition 106 to "end[] the practice of gerrymandering and improv[e] voter and candidate participation in elections," and to ensure "fair and competitive ... districts." JA50. The electorate voted to amend the legislative article of the state constitution to include "an appointed Redistricting Commission to redraw the boundaries for Arizona's legislative districts ... and to redraw the boundaries for

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[2] Leshy, *The Arizona State Constitution* 27; Ariz. Sec'y of State, *Official Canvas, State of Arizona, General Election–November 2, 1982*, at 11, http://www.azsos.gov/election/1982/General/Canvass1982GE.pdf (last visited Jan. 15, 2015); Ariz. Sec'y of State, *State of Arizona Official Canvas–General Election–November 4, 1986*, at 10, http://www.azsos.gov/election/1986/General/Canvass1986GE.pdf (last visited Jan. 15, 2015).

[3] Although Appellant suggests (at 3) that the Legislature consistently drew Arizona's congressional districts in the past, that is not accurate. From its admission to the Union to 1940, Arizona had only one Member of Congress. U.S. Census Bureau, *Apportionment of Membership of the U.S. House of Representatives*, https://www.census.gov/population/apportionment/files/2000%20PHC3%20Table%203.pdf (last visited Jan. 15, 2015). From 1966 to 1970 and 1982 to the early 2000s, the district lines were drawn by a federal court. *See Klahr* v. *Williams*, 313 F. Supp. 148, 149-150, 153-154 (D. Ariz. 1970); Norrander & Wendland, *Redistricting in Arizona* 177, 178-179, *in Reapportionment And Redistricting In The West* (Moncrief, ed. 2011).

the Congressional districts[.]" *See* JA61; Ariz. Const. art. IV, pt. 2, § 1.

The five-person redistricting commission "acts as a legislative body." *Arizona Minority Coal. for Fair Redistricting* v. *Arizona Indep. Redistricting Comm'n*, 208 P.3d 676, 683-684 (Ariz. 2009). Its commissioners "exercise discretion and make policy decisions ... [when] they decide where to draw district boundaries ... [and their] enactments carry the force of law and have prospective implications." *Id.* at 683-684. Commissioners serve a single, approximately ten-year term, during which their primary duty is to "establish congressional and legislative districts" according to criteria specified in the Arizona Constitution. Ariz. Const. art. IV, pt. 2, § 1, cls. 5, 14, 23.

The Legislature retains significant influence over the Commission. The Legislature's top leadership—the "highest ranking officer" and "minority party leader" in both houses—appoints four of the five commissioners from a pool of twenty-five nominees. Ariz. Const. art. IV, pt. 2, § 1, cls. 5-6. The fifth commissioner is selected by "majority vote from the nomination pool" by the four appointed commissioners. *Id.* cl. 8. They are subject to removal by "the governor, with the concurrence of two-thirds of the senate." *Id.* cl. 10. Further, the Commission is required to publish draft redistricting maps for comment and the Legislature may make recommendations about those maps, which the Commission is required to consider. *See* Ariz. Const. art. IV, pt. 2, § 1, cl. 16.

Finally, the Legislature maintains the power to refer constitutional amendments to the People of Arizona. Ariz. Const. art. IV, pt. 1, § 1, cl. 15; *id.* art. XXI, § 1. The Legislature can, for example, refer to the voters a

redistricting map that would, if approved, supersede the Commission's map. Indeed, the Speaker of the Arizona House of Representatives drafted just such a measure months before Appellant filed suit.[4] Although that proposal has not been submitted to the electorate, it is not unprecedented for the Legislature to refer temporary constitutional amendments to the voters.[5] The Legislature also retains the power to refer an initiative that would eliminate the Commission entirely—the voters of Arizona have previously repealed other constitutional amendments just years after their initial passage. *E.g.*, Leshy, *The Arizona State Constitution* 43 n.57.

D. Proceedings Below

In 2012—twelve years after the People of Arizona enacted Proposition 106—Appellant filed suit in the District of Arizona, contending that "the Elections Clause of the United States Constitution prohibits state voters from amending the Arizona Constitution to place the congressional re-districting function" in the Commission. Pet. App. 4, 7 (citation omitted). A three-

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[4] *See* http://www.azleg.gov/legtext/50leg/2r/bills/hcr2053p.pdf (last visited Jan. 15, 2015). Similarly, in January 2015, several members of the Arizona House proposed referring an amendment to the People that would increase the Commission's membership from five to six. *See* http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/52leg/1r/bills/hcr2005p.htm&Session_ID=114 (last visited Jan. 15, 2015).

[5] *See, e.g.*, Ariz. Const. art. IX § 12.1 (section entitled "Temporary taxes; repeal from and after May 31, 2013"); Pitzl, *State's 3-year-old Temporary Sales Tax Ends Today*, The Ariz. Republic, May 31, 2013, http://www.azcentral.com/news/politics/articles/20130530states-year-old-temporary-sales-tax-ends-today.html.

judge district court dismissed the suit for failure to state a claim. *See* Pet. App. 2-3.[6]

The court rejected Appellant's argument that the Elections Clause's use of the word "Legislature" prohibits the People of Arizona from vesting the legislative power to draw district lines in the Commission. Pet. App. 9-10. The majority noted that Appellant did not contest that "the initiative power is a legislative power," that "the people of Arizona used that legislative power to create the" Commission, or that "since its inception, the Arizona Constitution has reserved the initiative power to its people." Pet. App. 8-9. Nor could Appellant "effectively contest that in fulfilling its function of establishing congressional and legislative districts, the [Commission] is acting as a legislative body under Arizona law." Pet. App. 9.

Summarizing this Court's precedent, the majority explained that "states [are] not prohibited from designing their own lawmaking processes and using those processes for the congressional redistricting authorized by the [Elections] Clause." Pet. App. 10-16 (citing, among other cases, *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), and *Smiley* v. *Holm*, 285 U.S. 355 (1932)). Instead, "the relevant inquiry is ... whether the redistricting process [Arizona] has designated results from the appropriate exercise of state law"; "[t]o the extent that [Appellant's] argument is a veiled assertion that the [Commission] violates the Guarantee Clause, the argument is not justiciable." Pet. App. 17.

Judge Rosenblatt dissented, although he conceded that "it cannot be disputed that the Elections Clause's

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[6] The panel ruled that Appellant had standing to bring the challenge. *See* Pet. App. 5-6.

reference to 'the Legislature' ... refers to the totality of a state's lawmaking function as defined by state law, and that in Arizona a citizen initiative ... is an integral part of the state's legislative process." Pet. App. 20-21.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction over Appellant's challenge to the Commission. Appellant principally takes issue with the fact that the Commission was created by the People using the initiative power. As a creature of the State of Arizona, however, the Legislature lacks standing to challenge the distribution of lawmaking power under its State's constitution, which creates Arizona's legislative power and defines it as one shared among the People, the legislative body, and the Commission. Appellant's contention that the Elections Clause does not allow the People to regulate elections is ultimately a challenge to Arizona's form of government, which has always permitted the popular initiative. That claim presents a nonjusticiable political question that belongs in the political arena, not the federal courts.

Moreover, the Legislature has asserted no concrete and particularized injury under *Raines* v. *Byrd*, 521 U.S. 811 (1997). Proposition 106 has not nullified any specific exercise of the Legislature's power. Unless and until such a nullification occurs, the Legislature can allege nothing more than a hypothetical and "abstract dilution of institutional legislative power," *id.* at 826, insufficient to establishing standing.

II. The Elections Clause does not prohibit the People of Arizona from allocating to the Commission the power to draw congressional district lines. The Elections Clause safeguards the close connection between the People and their Representatives. The

Clause's two-part structure first empowers the People by assigning the duty to provide for the holding of congressional elections initially to state lawmakers, who were thought closest to the People. But the Clause's use of the term "Legislature" does not preclude the People from exerting more direct control over the holding of congressional elections through popular lawmaking. The Framers understood that word to mean "the power that makes the laws" under the state constitution, which may include the People themselves. Further, the Framers lodged the authority to prescribe congressional election regulations in state legislatures not because of the Framers' views of state elected officials, but in spite of them. The Framers' concern that state officials might disrupt the direct bond between the People and their Representatives animates the second part of the Elections Clause, which allows Congress to regulate the holding of congressional elections. The Elections Clause thus doubly empowers the People; Appellant's assertion that the People have somehow "usurped" the power from their own state elected officials is misguided.

Congress recognized that the People may directly regulate congressional elections over a century ago, when it enacted the predecessor statute to the current 2 U.S.C. § 2a(c). That statute provides that congressional districts may be "prescribed by the law of [a] State," *id.*, and the statute's legislative history reveals that Congress changed existing law to accommodate the initiative and referendum.

Because Congress exercised its power under the second part of the Clause to allow the type of state lawmaking embodied by Proposition 106, this Court need not consider the meaning of the word "Legislature" in the first part. Nevertheless, this Court has al-

ready done so and rejected Appellant's narrow definition of the word "Legislature." Faced with arguments remarkably similar to those advanced now, this Court in *Hildebrant* rejected the claim that the Elections Clause prevented the People from exercising their referendum power in the context of congressional redistricting. *See* 241 U.S. at 570. And in *Smiley*, this Court held more broadly that "the exercise of the authority [provided by the Elections Clause] must be in accordance with the method which the state has prescribed for legislative enactments." 285 U.S. at 367. This Court's decisions thus establish that the power to prescribe the manner of holding congressional elections is vested in all the lawmaking power of a State, however that power is allocated by the State's constitution.

Nothing about the text of the Elections Clause supports a contrary rule. Although Appellant initially claims support from the "plain text" of the Clause, that argument fails because numerous Founding Era sources show that "Legislature" was used capaciously and understood as "the power that makes the laws." Appellant's argument that "Legislature" in the Elections Clause must have the same scope as in other constitutional provisions (like Article V) has been conclusively rejected by this Court. Appellant's fallback argument—that the Clause requires state legislative bodies to have "primary responsibility" over redistricting—is unmanageable and unmoored from the constitutional text.

A construction of the Elections Clause that allows popular regulation of the times, places, and manner of holding congressional elections is also consistent with key constitutional values. The Commission's rule would promote the direct structural bond between the People and their Representatives in Congress, while

Appellant's rule would elevate state officials over the People. The Commission's rule accords with federalism principles allowing States the freedom to make policy choices on how best to regulate elections, whereas Appellant's rule would severely restrict the States.

The deleterious effects of Appellant's rule would be substantial. The voters of many States have regulated congressional elections for over a century, and numerous longstanding elections provisions, reaching well beyond redistricting, would likely fall if this Court accepts Appellant's arguments. Moreover, Appellant's rule will stymie state-based solutions to the problem of partisan gerrymandering. Because this Court has declined to adjudicate such claims, a decision for Appellant would cut off perhaps the only avenue left for reform. The Elections Clause in no way requires Appellant's counsel of despair.

ARGUMENT

I. The Arizona Legislature Lacks Standing To Bring This Suit

Appellant's challenge to a popularly created Commission is nonjusticiable for two separate but related reasons. *First*, Appellant's real claim is against the People of Arizona—indeed, Appellant's fundamental theory is that the People have "usurped" the Legislature's power (Br. 20). But as an organ established by the People, Appellant lacks standing to challenge the People's decisions about how to allocate lawmaking power, and its grievances are really nonjusticiable political objections to the structure of Arizona's government. *Second*, Appellant alleges only an abstract dilution of institutional power rather than the concrete and personal injury necessary to establish standing.

The Article III standing inquiry is particularly rigorous here, where reaching the merits would require the Court to second-guess fundamental decisions the People of a State have made about how to allocate powers among their organs of self-government. *See, e.g.*, *Taub* v. *Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988) ("Considerations of federalism should signal the same caution in these circumstances as concern for preservation of the proper separation of powers in an 'all federal' action."); *cf. Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

A. The Arizona Legislature Has No Standing To Challenge A Limitation On Its Powers Enacted By The People Of Arizona

1. Appellant lacks standing because its dispute is not so much with the Commission as with Arizona itself. Any curtailment of the Legislature's authority over redistricting was caused not by the Commission but by the People of Arizona when they exercised their sovereign power to amend the state constitution. But the federal Constitution gives a state legislature no rights against the State itself. *See Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009).

Appellant identifies no federal case in which a legislature was allowed to sue its own State, let alone attack the state constitution's structuring of the legislative power. That is because, like municipalities and school boards, the Legislature "is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. [The Legislature] remains the creature of the State exercising and holding powers and privileges subject to the sovereign will." *Trenton* v. *New Jersey*, 262 U.S. 182, 187 (1923); *see Williams* v. *Mayor & City Council of Baltimore*,

289 U.S. 36, 40 (1932); *cf. Alden* v. *Maine*, 527 U.S. 706, 752 (1999) ("A State is entitled to order the processes of its own governance[.]").[7]

Federal courts generally have no warrant to interfere with the distribution of powers within a state government. *See Sweezy* v. *New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in result) ("It would make the deepest inroads upon our federal system, for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the ... States.").[8] The cases of institutional standing identified by Appellant (at 18-19) generally involve a State or state agency suing the *federal* government alleging improper federal intrusion on the plaintiff's authority or rights; that situation is completely different, because the States do not derive their governmental powers from the federal government, but rather from the People. *See Cook* v. *Gralike*, 531 U.S.

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[7] Appellant has tried to present this suit as one against the Arizona Secretary of State, as though this were a straightforward action under *Ex parte Young*, 209 U.S. 123 (1908). But a *Young* suit by a state legislature against a state officer was "not only anomalous and unheard of at the time of the founding; it was anomalous and unheard of yesterday." *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1648 (2011) (Roberts, C.J., dissenting). Unlike a typical *Young* case, this is not a suit to vindicate individual rights against state interference, but is a pure intra-governmental dispute. *See id.* at 1644 (Kennedy, J., concurring) (noting that allowing such suits to proceed "may present constitutional questions").

[8] *See also Stanley* v. *Darlington Cnty. Sch. Dist.*, 84 F.3d 707, 717 (4th Cir. 1996) ("Federal courts may not be called upon, in the first instance, to adjudicate what is essentially an internal dispute between two local governmental entities." (citations and internal quotation marks omitted)); *Amato* v. *Wilentz*, 952 F.2d 742, 755 (3d Cir. 1991) (discussing "general reluctance of federal courts to meddle in disputes between state governmental units").

510, 519 (2001).[9] The novelty of this case, presenting the odd spectacle of a state legislature claiming its power has been stolen by the very People that created it and whom it is supposed to represent, is reason enough to conclude that this case does not belong to the "judicial power" of the federal courts. *See Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring); *cf. Federal Mar. Comm'n* v. *South Carolina Ports Auth.*, 535 U.S. 743, 755 (2002) (attributing "great significance" to the fact that certain suits did not exist "at the time of the founding or for many years thereafter").

2. At bottom, Appellant's challenge is to the form of government the People of Arizona have chosen for themselves. The Arizona Constitution, which created the state legislature and defines its powers, makes clear that "[a]ll political power is inherent in the people,

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[9] Although this Court has, on occasion, considered the merits of suits brought by political subdivisions against their parent States, those cases fall into two categories not applicable here. *See City of Hugo* v. *Nichols*, 656 F.3d 1251, 1255-1263 (10th Cir. 2011). First, in some of those cases, state agencies premised their claims on rights affirmatively granted to them by Congress. *See Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632 (2011); *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985). This Court's implied recognition that Congress can grant judicially enforceable rights to state subdivisions does not undermine the understanding, acknowledged in *Trenton*, *Williams*, and *Ysursa*, that the Framers did not intend constitutional provisions to grant political subdivisions their own rights vis-à-vis their parent States. In a second set of cases, the standing requirements were satisfied because of injury to individuals who were also plaintiffs, making it unnecessary to decide whether the state entity had standing. *See, e.g.*, *Romer* v. *Evans*, 517 U.S. 620 (1996); *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982). This Court did not address whether the state agencies were proper plaintiffs in those cases.

and governments derive their just powers from the consent of the governed." *See* Ariz. Const. art. II, § 2. The People of Arizona may, through amendments to the state constitution, allocate their legislative power as they deem appropriate, and they have done so by distributing those powers among the Legislature, the Commission, and the People themselves. *See Arizona Minority Coal. for Fair Redistricting* v. *Arizona Indep. Redistricting Comm'n*, 208 P.3d 676, 683-684 (Ariz. 2009); Ariz. Const. art. IV, pt. 1, § 1, cl. 1.

Appellant argues, in essence, that the People of Arizona have no right to exercise an important part of their legislative power, even where they have determined that state legislators have a vested interest. That is little different than asserting that the initiative is inconsistent with the constitutional guarantee of a "Republican form of Government"—a nonjusticiable question. *See Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U.S. 118, 151 (1912); *see also Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569-570 (1916). Again and again in its briefing, Appellant extols the relative virtues of representative bodies over other forms of lawmaking, *e.g.*, Br. 59, but the decision to allow popular lawmaking, even at the expense of representative lawmakers, is not one with which the federal courts may interfere. This Court should remit that debate to where it belongs—with the People of Arizona.

B. Appellant Has Failed To Allege Concrete And Particularized Injury

Legislatures lack standing to challenge "abstract dilution[s] of institutional legislative power." *Raines*, 521 U.S. at 825-826. That is all Appellant alleges here. *See, e.g.*, JA19 ("Prop. 106 eliminates entirely the Legislature's prescriptive role in congressional redistrict-

ing, and creates a new and extremely limited role[.]"). Proposition 106 may have diminished the Arizona Legislature's control over the redistricting process, but it nullified no concrete exercise of the Legislature's power, as *Raines* requires. Appellant's attack on the Arizona Constitution is merely a "generalized grievance" that the State is not following the law. *Lance* v. *Coffman*, 549 U.S. 437, 441-442 (2007).

Appellant relies (at 22 n.5) on *Coleman* v. *Miller*, 307 U.S. 433 (1939), but that decision is a narrow exception to the rule articulated in *Raines*, and is inapplicable here. *Coleman* stands "at most ... for the proposition that legislators whose votes would have been sufficient to defeat (or enact) *a specific legislative Act* have standing to sue if that legislative action goes into effect (or does not go into effect)." *Raines*, 521 U.S. at 823 (emphasis added). Appellant cannot point to any specific legislative act that would have taken effect but for Proposition 106.[10] Thus, Appellant asks this Court to review a hypothetical and "abstract dilution of institu-

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[10] This is not a situation, for example, where the Legislature, believing itself vested with sole authority to adopt a redistricting plan, did so and submitted it to the Secretary of State for implementation. Had the Legislature done so, then the Secretary of State presumably would have had to decide whether to implement the Legislature's plan or the Commission's (assuming they were different). *Compare Smiley v. Holm*, 285 U.S. 355, 361-362 (1932) (no question of justiciability raised where state legislature passed redistricting bill and, despite subsequent gubernatorial veto, delivered the bill to Secretary of State for implementation), *with Goldwater* v. *Carter*, 444 U.S. 996, 997-998 (1979) (Powell, J., concurring in the judgment) (dispute over President's treaty-termination power was unripe, absent specific action taken by Senate to challenge it, because "we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches").

tional legislative power" of the sort this Court declined to review in *Raines*. *Id.* at 826.

Appellant incorrectly asserts (at 16, 22 n.5) that complete removal of the state legislature's authority to redistrict is sufficient to establish a cognizable harm regardless of whether a specific vote was nullified. Even if true, the Legislature could not demonstrate such injury here because Appellant maintains significant control over redistricting. Its leadership appoints four of five commissioners;[11] the Senate, with the Governor, may remove commissioners for cause; both houses of the Legislature can comment on the Commission's proposed map; and the Legislature can enact its own temporary redistricting plan or regain the redistricting power by referring a constitutional amendment to the People of Arizona. *See supra* pp. 9-10.

Appellant argues (at 40) that the Legislature's power to refer constitutional amendments to the People is illusory, analogizing the possibility to Congress's power to propose constitutional amendments to the States. But the comparison is inapposite; unlike the federal Constitution, the Arizona Constitution was designed to be, and has been, frequently amended. *See supra* pp. 5-7; *compare* Ariz. Const. art. XXI § 1 (amendment put on the ballot when approved by a simple legislative majority, and ratified by a majority of the people voting on it) *with* U.S. Const. art. V. Contrary to Appellant's assertion (at 41), the state constitution does not bar the Legislature from submitting an

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[11] The Legislature chooses its own leadership, so the prerogative to select commissioners ultimately belongs to the Legislature. *See* Ariz. Const. art. IV, pt. 2, § 1, cl. 6; *see also* NCSL Br. 17 (acknowledging constitutionality of commissions where legislative leaders choose commissioners).

amendment to the People that modifies a prior amendment; it provides the Legislature with the power to submit constitutional amendments "to the vote of the people," Ariz. Const. art. XXI, § 1, and preserves the right of the Legislature to refer "*any* measure" "to the people at the polls." Ariz. Const. art. IV, pt. 1, § 1, cl. 15 (emphasis added).

Appellant also contends (at 21) that without standing here it will lack an adequate remedy. But Appellant could accomplish its goal through political means, which is how, as this Court has reiterated, political disputes should be resolved. The Legislature often puts constitutional amendments on the ballot, and they usually pass. *See supra* pp. 6-7. Appellant's voice can be heard in the political debate; it is hardly a powerless actor for whom the traditional rules of standing must be relaxed. *Cf. Goldwater* v. *Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment) ("Here ... we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.").[12]

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[12] The *Raines* Court attached "some" importance to the fact that the case was brought by individual legislators; it offered no further explanation of its weight, 521 U.S. at 811, but the overwhelming majority of the opinion focused on the lack of concrete nullification, the availability of a political solution, and historical practice.

II. THE ELECTIONS CLAUSE AND 2 U.S.C. § 2a ALLOW THE PEOPLE OF ARIZONA TO PRESCRIBE THE MANNER OF CONGRESSIONAL REDISTRICTING

A. The Elections Clause Was Designed To Secure The People's Influence Over The National Government, Not To Entrench State Legislators' Privileges

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4. The two-part structure of the Clause reflects the Framers' judgment about how to ensure that the House of Representatives remained closely bound to the People, while also preventing the States from impairing the national government. The Elections Clause vests the initial duty to regulate congressional elections in state-based lawmaking, as close to the People as possible, but also authorizes Congress to intervene to prevent state election regulations from being manipulated by state officials (as the Framers feared they might be). That structure prevents self-interested state officials from interposing themselves between the People and their national representatives. *See U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 808 (1995).

Congress affirmed this understanding of the Elections Clause when it authorized redistricting by initiative. This Court too has upheld the power of the People to regulate congressional elections. Appellant now proposes that this Court ignore the original understanding of the Clause and upend a century of precedent, to take the authority to regulate congressional elections under state law away from the People and

lodge it exclusively in the hands of state officials in the first instance. But Appellant's core argument—that the Arizona Legislature's duty to prescribe the time, place, and manner of elections has been "usurped" by the People of its own State—fundamentally misunderstands the Elections Clause and the constitutional functions and values it serves.

There was little discussion during the Founding Era of the first part of the Elections Clause, which delegates the responsibility to regulate elections to each State's "Legislature." It is clear, however, that the Framers intended the obligation to regulate congressional elections to be placed close to the People in the first instance. *See* Natelson, *The Original Scope of Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 31 (2010); *cf.* Federalist No. 68 (Hamilton) (notwithstanding its use of the word "Legislature," touting Article II's Electors Clause as providing that "the people of each State shall choose a number of persons as electors").

After considering whether to assign that duty to state or federal lawmakers, the Framers opted to align it primarily with the state lawmaking process because it was closest to the People, and because it was already the means of regulating state elections. *See, e.g.*, Federalist Nos. 59, 61 (Hamilton). But they did so *despite* their well-documented concerns that state-based political actors would improperly influence or corrupt the People's ability to elect a national government. *See* Federalist No. 59 (Hamilton).[13] Permitting local elect-

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[13] Madison, for example, viewed state legislatures with extreme suspicion, arguing for a congressional veto over *all* state laws. *E.g.*, *Letter from James Madison to Thomas Jefferson, Mar. 19, 1787, in* 2 *The Writings of James Madison* 324, 326 (Hunt, ed.

ed representatives to regulate congressional elections was not an end in itself, as Appellant suggests (at 32-35), but only a means of vesting that power close to the People.

The Framers did not, however, exclude other means of state lawmaking that would ensure that elections fairly represented popular choice. The Elections Clause's reference to state "Legislature[s]"—a term that meant, simply, "the power that makes the laws," *infra* pp. 39-40—signifies the state-level lawmaking process that is closest to the People, and that has always been left to them to structure as they see fit. The initiative and referendum did not exist in 1787. But the Framers did not require the States to adopt any specific configuration of governmental power. Instead, they allowed the People to structure state governmental power as they wished—a decision that accords with basic federalism principles. *See, e.g.*, Federalist No. 43 (Madison); *see also infra* pp. 46-48.

The second part of the Elections Clause reinforces these points by safeguarding the direct relationship between the People and their national representatives. *See Cook*, 531 U.S. at 528 (Kennedy, J., concurring); *Thornton*, 514 U.S. at 821. Giving States the exclusive duty to regulate congressional elections, the Framers believed, "would leave the existence of the Union entirely at their mercy." Federalist No. 59 (Hamilton); *Records of the Federal Convention*, *in* 2 *The Founders' Constitution* 248 (Kurland & Lerner eds., 1987) (Madi-

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1901); *see also Letter from James Madison to Thomas Jefferson, Oct. 24, 1787*, *in* 5 *The Writings of James Madison* 17, 27 ("The injustice of [the acts of state legislators] has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism.").

son explaining that state governments may "refuse to consult the common interest" when regulating elections due to "their local conveniency or prejudices"). The Framers therefore made Congress's power to regulate federal elections "paramount," to be exercised "to any extent which it deems expedient." *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253-2254 (2013); *see also Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2636 n.2 (2013). Congress's Elections Clause power serves as "the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress," *Inter Tribal*, 133 S. Ct. at 2253, or otherwise interfere with the relationship between national representatives and those they serve. And Congress has exercised this power numerous times. *See, e.g.*, Natelson, *Original Scope*, at 5 & nn.13-16.

Both parts of the Elections Clause stem from the fundamental premise that all political power flows from the People. *McCulloch* v. *Maryland*, 17 U.S. 316, 404-405 (1819). When the Framers "split the atom of sovereignty," they ensured that each order of government, state and federal, would have "its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Thornton*, 521 U.S. at 838 (Kennedy, J., concurring). Under the Elections Clause, the People are doubly empowered: controlling the state lawmaking process in the first instance and retaining the ability to seek federal intervention from their national representatives if necessary.

Viewed in this light, the notion that the People can somehow "usurp" the duty imposed by the Elections Clause from state officials by engaging in popular lawmaking is not simply wrong, but bizarre. Appellant's

proposed rule, which would place state elected officials above the People themselves at the expense of the direct relationship between them and their federal representatives, is fundamentally inconsistent with the Framers' design. For just that reason, it has been rejected by this Court and by Congress.

B. Congress Invoked Its Elections Clause Power In 2 U.S.C. § 2a(c) To Permit Redistricting Decisions To Be Made By Voter Initiative

Congress spoke to the exact issue raised here in 2 U.S.C. § 2a(c), which provides a ground on which to dispose of this case without determining the meaning of the word "Legislature" in the Elections Clause. At a minimum, that statute reflects Congress's long-held interpretation of the Clause.

Congress authorized the People to regulate the manner of congressional elections by initiative over a century ago when it enacted what is now Section 2a(c), which provides that Representatives "shall be elected from the districts then prescribed *by the law of such State*." (Emphasis added.) When Congress enacted the first version of the statute including that language, the Apportionment Act of 1911, it invoked its Elections Clause power to permit redistricting by initiative. The 1911 Act's language was drafted "for the express purpose, in so far as Congress had power to do it, of excluding the possibility" that redistricting via a direct democracy mechanism would be declared invalid. *Hildebrant*, 241 U.S. at 568-569.

1. Congress altered the text of § 2a(c)'s predecessor statute to allow for redistricting by initiative

The text of the Apportionment Act of 1911, the direct predecessor of Section 2a(c), makes plain that Congress invoked its Elections Clause power to permit States to regulate redistricting using direct democracy mechanisms like the initiative. The 1911 Act laid out the apportionment of Representatives following the 1910 census; Section 4 provided that

> in the case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law *until such State shall be redistricted in the manner provided by the laws thereof*[.]

Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 14 (emphasis added).

This Court has twice recognized that this wording was a deliberate change from the language in the prior Apportionment Act of 1901. Section 4 of the 1901 Act provided that new Representatives

> shall be elected by the State at large, and the other Representatives by the districts now prescribed by law *until the legislature of such State in the manner herein prescribed, shall redistrict such State*[.]

Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734 (emphasis added); *see also Branch* v. *Smith*, 538 U.S. 254, 274 (2003) (plurality opinion) (noting that 1882 and 1891 apportionment acts used language similar to 1901 Act).

The *Hildebrant* Court explained that Congress in the 1911 Act "plainly intended" that in States where direct democracy mechanisms existed, they constituted "part of the legislative power ... for the purpose of creating congressional districts by law." 241 U.S. at 568-569. This Court reaffirmed its conclusion sixteen years later, pronouncing that "the act of 1911, in its reference to state laws" serves as a "legislative recognition of the nature of the authority deemed to have been conferred by" the Elections Clause. *Smiley* v. *Holm*, 285 U.S. 355, 372 (1932).[14]

The legislative history confirms that Congress intended the 1911 Act to permit redistricting by initiative. *See* 47 Cong. Rec. 673-675, 701-703, 3436-3437, 3507-3508 (1911). For example, Representative Edgar Crumpacker of Indiana, a proponent of omitting the phrase "by the legislature thereof," explained that the change would ensure that the "States shall have the right to [have redistricting performed by a vote of the people] if they see fit to do so." 47 Cong. Rec. 674-675; *see also id.* at 702 (statement of Rep. Bartholdt)

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[14] Dicta in *Smiley* suggests that "Congress had no power to alter [the Elections Clause] and that the act of 1911, in its reference to state laws, could but operate as legislative recognition of the nature of the authority deemed to have been conferred by the constitutional provision." 285 U.S. at 372. That statement was unnecessary to the decision in *Smiley*, which did not present the issue of Congress's power under the Elections Clause and which upheld the principle that a state legislature's power over congressional redistricting is subject to limitations in the state constitution—there, the gubernatorial veto. *Id.* at 367-368. It also must not be read to contradict *Hildebrant*'s conclusion that Congress in 1911 had acted "in so far as [it] had power to do it" to permit redistricting by direct democracy mechanisms and that "the Constitution expressly gave [it] the right to do [so]." 241 U.S. at 568-569.

(Crumpacker amendment "propose[d] to leave the matter of redistricting to the people themselves").

While the Crumpacker amendment—which would have simply stricken the words "by the legislature thereof" from what became § 4 of the 1911 Act—did not ultimately pass, a similar amendment proposed by Senator Theodore Burton of Ohio did. Senator Burton explained that using the words "by the law of such State" in the 1911 Act would give "to each State full authority to employ in the creation of congressional districts *its own laws* and regulations." 47 Cong. Rec. 3437 (emphasis added). He worried that, without amendment, the statute would "send[] the message, 'Do it in only one specified way; that is, by your legislature.'" *Id.* Senator Burton's successful amendment, by contrast, "simply [left] the question [of redistricting] to the laws and methods of the States. If they include initiative, it is included." *Id.* at 3508. Senator Burton's and others' statements "leave[] no room for doubt" that the 1911 Act was intended to ensure that States could use popular lawmaking to regulate redistricting. *See Hildebrant*, 241 U.S. at 568-569.

2. Section 2a(c) is derived from the 1911 Act, remains operative, and is constitutional

The 1911 Act is the direct "predecessor to the current § 2a(c)," Appellant Br. 55, and so its text and legislative history inform how Section 2a(c) should be read. Indeed, this Court has recognized the link between the two statutes. *See Branch*, 538 U.S. at 274 (plurality opinion) (describing earlier apportionment acts as "prior versions of §2a(c)"); *id.* at 295 (O'Connor, J., concurring in part and dissenting in part) ("The 1911 statute—the one in effect at the time Congress enacted the pre-

sent version of § 2a(c)—is almost word for word the same as the current statute.").

The current language in Section 2a(c) can be directly traced to the 1911 Act. When Congress next enacted a reapportionment statute, it did not disturb the key language in the 1911 Act. *See* Act of June 18, 1929, ch. 28, § 22, 46 Stat. 26; *Smiley*, 285 U.S. at 373-375 (explaining that 1929 Act repealed only laws "inconsistent with its provisions," which Section 4 of 1911 Act was not). The next and final major change came in 1941, when Congress added the current language that Representatives "shall be elected from the districts then prescribed *by the law of such State.*" Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761-762 (emphasis added). That language, closely related to that in the 1911 Act, recognized the permissibility of redistricting by initiative. The most natural interpretation of the statutory text, especially given its history, is that it authorizes redistricting by any means allowed under "the law" of each State. *See id.*[15]

Appellant acknowledges that Section 2a(c) is still operative, *see* Br. 54-55,[16] but argues (at 56) that if Sec-

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[15] Because *Branch* involved judicial redistricting, the Court naturally focused on § 2a(c)'s applicability to courts. *See* 538 U.S. at 258, 274. Accordingly, Appellant's argument (at 56) that this Court "construed th[e] modification [in the 1911 Act's language] as encompassing *judicial* redistricting" is true but irrelevant; redistricting by initiative was not at issue in *Branch*. Nothing in the statute's text suggests the odd proposition that Congress's accommodation of state redistricting power was confined to the state judiciary.

[16] Six Justices in *Branch* agreed that Section 2a(c) had not been impliedly repealed. 538 U.S. at 274-275 (plurality opinion), 282 (Kennedy, J., concurring), 292-293, 298 (O'Connor and Thomas, JJ., concurring in part and dissenting in part).

tion 2a(c) has "any relevance" to this case—that is, if it is an invocation of Congress's Elections Clause power—then it is "plainly unconstitutional" because it tramples on state legislatures' prerogatives. That argument is wrong. *See Hildebrant*, 241 U.S. at 569 (holding that "the Constitution expressly gave [Congress] the right to" permit redistricting by direct democracy mechanisms). The Framers granted Congress the ultimate supervisory power over congressional elections precisely *because* state legislatures might try to manipulate the federal elections system in a way that would attenuate the connection between Congress and the People. *See supra* pp. 23-27. But it would not be practicable for Congress to regulate every aspect of federal elections in States where such a threat might lurk, nor would it be logical for the Constitution to give Congress the Hobson's Choice of either regulating election minutiae itself or surrendering its power under the Elections Clause. Congress's power under the Clause allows it to enlist another entity within the States that must be presumed loyal to the national government: the People.

Appellant (at 56-57) cites statements by supporters of the Constitution at the North Carolina ratifying convention about whether Congress might use the Elections Clause to "extend the terms of Representatives and Senators beyond those specified in the Constitution." Such hypothetical abuse of Congress's power is plainly inapposite here; as the North Carolina Federalists pointed out, the length of the terms of Representatives and Senators are prescribed by specific constitutional provisions, *see* U.S. Const. art. I, §§ 2-3, and so a law extending the terms "would be a palpable violation of the Constitution." *Debate in North Carolina Ratifying Convention, 25 July 1788*, *in* 2 *The Founders' Constitution* at 275 (Mr. Maclaine); *see also id.* at 271 (Mr.

Iredell). Nor does this case involve any misuse of Congress's Elections Clause Power to affect matters beyond the "Times, Places and Manner" of holding elections, such as by influencing the outcome of elections, *cf. Cook*, 531 U.S. at 523-524, or adding qualifications beyond those in the Qualifications Clauses, *see Powell* v. *McCormack*, 395 U.S. 486 (1969). Congress and the States have long treated redistricting as falling within their powers under the Elections Clause. In enacting Section 2a(c), Congress permissibly exercised its authority to allow States to exercise *theirs* through popular lawmaking.

C. This Court's Precedent Holds That The Word "Legislature" In The Elections Clause Means "Lawmaking Power"

Even if Congress had not expressly spoken to this issue under its own Elections Clause authority and provided that the People may regulate congressional districting by initiative, Appellant's submission that the People may not do so would still fail. This Court has already rejected the narrow definition of "Legislature" that Appellant proposes, namely that the term refers exclusively to a body of elected representatives.[17] In both *Hildebrant* and *Smiley*, this Court explained that the Elections Clause does not bar state entities other than a representative body from prescribing the manner of congressional elections. Both cases make clear that congressional elections may be so regulated through the lawmaking process of a State, pursuant to that State's constitution.

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[17] Appellant's brief eventually implicitly concedes that this definition cannot be squared with this Court's precedent and offers another flawed definition of "Legislature" that is disconnected from the constitutional text. *See infra* pp. 42-44.

1. In *Hildebrant*, this Court rejected virtually all of the arguments Appellant advances in this case. In 1912—as numerous States were adopting the initiative and referendum—the People of Ohio amended their state constitution to provide for a veto by referendum over acts of the state assembly. 241 U.S. at 566. Several years later, the People rejected an assembly-backed redistricting law, and a relator brought suit, arguing that the Elections Clause required that the assembly's districts be enforced, notwithstanding the referendum. *Id.* at 566-567.[18]

Petitioner's arguments there were strikingly similar to Appellant's here: An adverse ruling would allow "the power to prescribe the 'times, places and manner' of electing representatives [to] be taken away from the legislature or controlled by State constitutions"; "there is but one 'legislature' empowered to act under" the Elections Clause; and "the power exclusively given to the legislature by the supreme organic law of the United States cannot either be delegated or assumed in any manner by the people of the state of Ohio." *Hildebrant*, Pet. Br. 30, 56, 60; *compare* Appellant Br. 24-27, 50-51.

This Court rejected those submissions. After explaining that the referendum was a valid legislative act by the People under the Ohio constitution and that Congress had "treated [such referenda] to be the state legislative power for the purpose of creating congressional districts by law" in the Act of 1911, the Court addressed "the contention ... that to include the refer-

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[18] The present case thus presents the other side of the same coin as *Hildebrant* with respect to the power of elected legislators. Even now, Appellant can refer its own redistricting plan to the People, which would take effect if approved by a majority of the voters. *See supra* pp. 9-10.

endum within state legislative power for the purpose of apportionment is repugnant to § 4 of article 1 of the Constitution and hence void," and found that assertion to be "without substance." 241 U.S. at 258-259. The petitioner's argument was ultimately an attack on Ohio's chosen form of government—an assertion that "to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power." *Id.* But because the People's veto was a valid legislative act, any further inquiry raised only nonjusticiable questions.

Here, as in *Hildebrant*, the People of Arizona have set redistricting policy by exercising the legislative power reserved to them in their state constitution. *Arizona Minority Coal.*, 208 P.3d at 683-684. That the People used their lawmaking power to create the Commission—a separate legislative body housed within the Arizona Constitution's legislative article—and to prescribe the process by which it engages in redistricting does not change the analysis. The manner in which Arizona redistricting decisions are made (*i.e.*, by the Commission) and the criteria by which the Commission makes them were determined in the first instance by the People. *See supra* pp. 8-9. Appellant has not disputed that the People's creation of the Commission was a legislative act.

2. *Smiley* confirmed the rule announced in *Hildebrant*, making it even clearer that the Elections Clause grants the power to regulate elections to the "lawmaking power" of a State, and not simply to a representative body alone. 285 U.S. at 371.

In *Smiley*, the Governor of Minnesota vetoed a redistricting plan passed by the state legislature. The Secretary of State enforced the plan anyway, arguing

that the legislature's action was all that was required. The Minnesota Supreme Court agreed. *See id.* at 364-365. Again, the respondents in *Smiley* made similar arguments to those Appellant advances. They contended that "[t]he provisions of the constitution of the state cannot take the power from the legislature of the state ...," and that "[i]f the framers of the constitution had intended that the lawmaking power of the state, including the power of gubernatorial veto, should be exercised in prescribing the times, places and manner of holding elections for senators and representatives, they would have used the word 'state' or some expression such as 'law making power of the state,' or 'by the legislature with the approval of the executive.'" *Smiley*, Resp. Br. 24, 31-32; *compare* Appellant Br. 28-30, 42; Coolidge-Reagan Br. 4-20.

Again, as in *Hildebrant*, this Court rejected those arguments. The Court noted that the Constitution uses the word "Legislature" in several different places in relation to the exercise of different powers, and explained that the meaning of that term must be discerned by examining the specific "function to be performed" in a particular constitutional provision. *Smiley*, 285 U.S. at 365-366. For example, in choosing senators before the Seventeenth Amendment, the "Legislature" acted as an "electoral body"; in considering Article V amendments, it acts as a ratifying body. *Id.* (citing *Hawke* v. *Smith*, 253 U.S. 221, 231 (1920)). Under the Elections Clause, the function delegated "is that of making laws"—that is, legislating "a complete code" governing elections. *Id.* at 366. And because the Elections Clause deals with lawmaking authority, "the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367.

This Court thus held squarely that the Elections Clause does not "endow the Legislature of the state with power to enact laws *in any manner other than that in which the Constitution of the state has provided* that laws shall be enacted." 285 U.S. at 368 (emphasis added). How States structure that lawmaking process is "a matter of state polity," the specifics of which the Elections Clause "neither requires nor excludes." *Id.* The *Smiley* Court made clear that its holding included popular lawmaking, citing *Hildebrant* and explaining that "it was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections[] was sustained." *Id.* at 372. Indeed, the Court had made that same point in an earlier ruling. *See Hawke*, 253 U.S. at 230-231 ("[T]he referendum provision of the state Constitution [in *Hildebrant*] ... was not unconstitutional. Article 1, section 4, plainly gives authority to the state to legislate within the limitations therein named.").[19]

This Court has expressed no doubts about these principles, explaining in other contexts that "reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*, rather than of a federal court." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993) (emphasis added); *see also Colorado Gen. As-*

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[19] Appellant's own citations (at 25) demonstrate that this Court has repeatedly referred to the Elections Clause power as one conferred on the "States" generally. *Inter Tribal*, 133 S. Ct. at 2253 (Clause "invests the States with responsibility for ... congressional elections"); *Cook*, 531 U.S. at 522 ("Through the Elections Clause, the Constitution delegated to the States the power to regulate[.]"); *Thornton*, 514 U.S. at 805 (Elections Clause is an "express delegation[] of power to the States").

sembly v. *Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari) ("the function referred to by Article I, § 4, was the lawmaking process, which is defined by state law"; judicial redistricting is problematic because it lacks "participation in the process by a body representing the people, *or the people themselves in a referendum*" (emphasis added)). In light of *Hildebrant* and *Smiley*, the result in this case is clear: The Commission may draw congressional district lines because it was created by the People using Arizona's lawmaking process, as defined by the state constitution, and was directed to exercise the State's legislative power in this area.

D. The Text Of The Elections Clause Does Not Require Appellant's Proposed Rule

Appellant initially argues in favor of a purported "plain text" reading of the Elections Clause, contending (at 23-28) that the word "Legislature" in the Clause refers "to one entity alone: 'the Legislature' of a State." That argument fails on its own terms; as Founding Era sources (and this Court's prior decisions) reveal, that term was used to refer to the entire lawmaking power of a State, whether or not vested in an elected body. Perhaps recognizing the difficulties with that textual argument, as well as its inconsistency with precedent and historical practice in the States, Appellant later abandons it and instead suggests the Elections Clause requires that state legislatures have "primary responsibility" for regulating elections (*see* Br. 53, 59). That unworkable standard has no relationship to the constitutional text. Rather, the text, this Court's decisions, constitutional principles, and practice all point to one answer: The word "Legislature" in the Elections Clause encompasses all the lawmaking power of the State.

1. The word "Legislature" in the Elections Clause encompasses all the lawmaking power of the State

Numerous sources, from dictionaries to the statements of the Framers, make clear that writers and speakers of the Founding Era used the word "Legislature" in several different ways, depending on the context, and often used it capaciously to refer to the entirety of lawmaking power within a polity.[20] For example, James Wilson, in discussing the Elections Clause during the ratification debates, used "state legislature," "state government," and "state" interchangeably to describe the body in which primary authority for election regulation was vested. *See Debate in the Pennsylvania Ratification Convention, Oct. 28, 1787, in* 2 *The Founders' Constitution* 250-251. More broadly, Charles Pinckney explained at South Carolina's Ratifying Convention that America is "[a] republic, where the people at large, either collectively or by representation, form the legislature." *See* 4 Elliot, *The Debates in the Several State Conventions on the Adoption of the Constitution* 328 (1836).[21]

Founding Era dictionaries, including several cited by Appellant (at 39), similarly stated that the word

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[20] Appellant relies on out-of-context quotations from Founding Era statesmen expressing the aspiration that elected assemblies should be "'select bodies'" of the "'*best men.*'" Br. 27. But those statements do not purport to define the word "Legislature" or to relate to the Elections Clause.

[21] Likewise, John Adams, in his treatise on republican constitutions, called the Swiss Canton of Zug, which used an initiative-type system of direct popular lawmaking, a "democratical republic," where the electorate constituted a "general assembly" in which "the sovereignty resides." Adams, *A Defence of the Constitutions of Government of the United States of America* 31 (1787).

"legislature" means "[t]he power that makes laws"—not necessarily an elected, representative body. *E.g.*, 2 Johnson, *A Dictionary of the English Language* (10th ed. 1792); *see also, e.g.*, Webster, *A Compendious Dictionary of the English Language* 174 (1806) ("Legislature, n. the power that makes laws"). And the Northwest Ordinance of 1787—a seminal legal document of the period—defined the word "legislature" more broadly than simply an elected, representative body, stating that it "shall consist of a governor, legislative council and a house of representatives."[22] These references show that the term "Legislature" was, for the Framers, multifaceted, and readily susceptible to the broader definition this Court has already embraced: "legislative power."[23]

Appellant nonetheless argues (at 28-29) that the word "Legislature" must have the same meaning every time it appears in the Constitution, and must always refer to the State's elected body of representatives. But this Court has already rejected that approach, *see supra* p. 36, explaining that the meaning of "Legislature" must be examined with attention to the context and purpose of the specific provision in which it falls. *See Smiley*, 285 U.S. at 365-366. Thus, while "Legisla-

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[22] An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio ¶ 11 (July 13, 1787), *available at* http://www.ourdocuments.gov/doc.php?flash=true&doc=8&page=pdf.

[23] Appellant's argument (at 50) that the Commission is asking this Court to view it as "*a* Legislature" also fails. The phrase "the Legislature" encompasses the entire legislative power of a State, however the People have allocated it in their Constitution. The Commission thus exercises *the* legislative power of the State of Arizona, just as the Arizona Legislature does, and just as the People do when legislating by initiative.

ture" in the Elections Clause *does* include popular lawmaking by initiative, given that that Clause refers to the broad lawmaking power of the State, *see Hildebrant*, 241 U.S. at 569-570, "Legislature" as used in Article V's constitutional amendment process *does not* allow States to submit proposed constitutional amendments to a popular vote, because Article V encompasses a much narrower ratifying or consenting role for the state legislature, *see Hawke*, 253 U.S. at 229-231.[24] Here, the function at issue is lawmaking, and thus the word "Legislature" means the legislative power, as the State allocates it. Just as this Court held in *Smiley* and *Hawke*, the fact that the word "Legislature" is used elsewhere in the Constitution to accomplish a completely different function is not determinative here.

The *Smiley* analysis also illustrates why Appellant's Seventeenth Amendment argument (at 29-30) lacks merit. The function of the Legislature in choosing Senators prior to the enactment of the Amendment was "electoral," *Smiley*, 285 U.S. at 365, and the Framers specifically vested the power to choose Senators in state legislatures because they wanted Senators to be a step removed from popular influence. *See, e.g.*, Federalist No. 63 (Madison). The opposite intent influenced the Framers' design of the Elections Clause; the power to regulate congressional elections was initially vested in state legislatures because they were comparatively closer to the People. *See supra* pp. 23-25.[25]

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[24] For similar reasons, Appellant's reliance (at 26-28) on the fact that the Constitution also contains terms like "State" and "Executive Authority" is unavailing. A similar argument was made in *Smiley* (*see Smiley* Resp. Br. 34-35) and did not prevail.

[25] Appellant also contends (at 48) that calling the Commission a legislative body merely because it engages in redistricting is cir-

2. Appellant's "primary responsibility" standard is unmanageable and has no relationship to the constitutional text

Perhaps recognizing the need to reconcile its position with this Court's decisions in *Hildebrant* and *Smiley*, Appellant shelves its "plain text" argument midway through its brief, and submits instead that the Framers meant the word "Legislature" to require a "continuing role" for the State's representative body in regulating elections, in which that body has "'primary responsibility.'" Br. 44, 51. But Appellant cites nothing to support such a reading, and it would be unmanageable as a constitutional rule.[26] Adopting such a nebulous standard would invite Elections Clause challenges to a host of election regulations, which in the States are often the product of rules set by initiative, traditional state legislation, administrative regulations, and local ordinances. Each case would require this Court to examine the particular political dynamic among an elected legislature, the People, and other political actors to determine who had "primary" responsibility, and whether the role of

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cular. But that is not the only reason why the Commission is a legislative body. Rather, as the Arizona Supreme Court has explained, the Commission is a legislative body because its "acts bear 'the hallmarks of traditional legislation' in that commissioners exercise discretion and make policy decisions" and because "Commission enactments carry the force of law and have prospective implications, other hallmarks of traditional legislation." *Arizona Minority Coal.*, 208 P.3d at 683-684. That traditional understanding of the legislative power is not unlimited; it excludes, for example, unilateral gubernatorial regulation of congressional elections.

[26] Appellant draws its "primary responsibility" language from cases that relate to judicial redistricting, *e.g.*, Br. 16 (citing *Maryland Comm. for Fair Representation* v. *Tawes*, 377 U.S. 656 (1964)), and that say nothing about the ability of the People to exercise legislative power under the Elections Clause.

elected officials was sufficiently "continuing." This Court has rejected similar inquiries as too unwieldy to guide judicial inquiry. *See Vieth* v. *Jubelirer*, 541 U.S. 267, 288 (2004) ("predominant intent" standard for partisan gerrymandering claims was unmanageable).

The National Conference on State Legislatures' amicus brief highlights the point. In the NCSL's view, States like Idaho, where legislative leaders select two thirds of a six-member redistricting commission and unelected political party chairs select the other two, do not offend the Elections Clause. NCSL Br. 11-12. But, according to the NCSL, Arizona's Commission, where 80% of the body is selected by elected legislative leaders, offends the Clause because Arizona's legislative leaders must choose from a limited pool of potential commissioners and thus do not have "unfettered" discretion to appoint. *Id.* at 4, 10. No principled distinction can be drawn between these virtually identical entities. Indeed, it is not at all clear that Arizona's redistricting scheme even violates Appellant's "primary responsibility" rule, for the Legislature maintains substantial influence over the redistricting process. *See supra* pp. 9-10.

Appellant also tries (at 39-40) to support its new standard by arguing that the constitutional requirement to "prescribe" election regulations is not satisfied unless the Legislature has primary responsibility over redistricting. But that assertion simply assumes that the word "Legislature" excludes popular lawmaking—the very question in this case. Moreover, Appellant's own definition of "prescribe" would seemingly require state legislatures to have total, not simply primary, power to "'dictate, ordain, or direct'" election rules, (Br. 39), and would force them to regulate every election issue, no matter how minor. That prospect is not only

contrary to Appellant's "primary responsibility" theory, it is unworkable in practice and unsupported by the constitutional text or this Court's decisions.

The better rule—one that is consistent with the cases, and the constitutional text, purpose, and structure—is that "Legislature" means the State's legislative power as defined by that State's constitution.

E. Popular Regulation Of Congressional Elections Is Consistent With Core Constitutional Principles

Appellant's rule is at odds with core constitutional principles. *First*, it would conflict with the purpose of the Elections Clause, which was meant to protect the direct relationship between Congress and the People from potential interference by state officials. *Second*, Appellant's position would restrict state policymaking and impose structural requirements on state governmental forms, in violation of principles of federalism. *Third*, Appellant's position denigrates popular sovereignty.

1. The Elections Clause protects the People's direct relationship with Congress, not state officials' privileges

A fundamental principle of Article I is that Members of Congress are the "immediate Representatives of the People." *Letter from T. Pickering to C. Tillinghast, Dec. 24, 1787, in* 1 *The Founders' Constitution* 252. That direct bond between Congress and the People, unmediated by the States, is central to the Constitution's architecture. *See* U.S. Const. art. I, § 2; *Thornton*, 514 U.S. at 821 ("[T]he Framers ... conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen di-

rectly, not by States, but by the people."); *Cook*, 531 U.S. at 528 (Kennedy, J., concurring); 1 Story, *Commentaries on the Constitution of the United States* § 627 (5th ed. 1994) (representatives are "neither created by, dependent upon, nor controllable by the states").

The Framers were concerned that state officials might interfere with, or even destroy, that link. That concern led them to draft not only the second part of the Elections Clause, but also other provisions designed to prevent local interference with the accountability of federal legislators. *See, e.g., Thornton*, 514 U.S. at 808 (Qualifications Clause and congressional salary). The Framers chose to entrust congressional election regulation to state lawmaking processes in the first instance *despite* their concerns with the potential corruption of state legislative bodies. *See supra* pp. 23-27.

In Appellant's view, the Elections Clause was intended to protect the Constitution (and, in particular, the Congress) *from the People* by placing control over congressional elections in the hands of elected state legislators. But that approach to the Clause is the opposite of the Framers'. Although, as Appellant notes, the Framers were concerned about unchecked popular passions and therefore designed a complex republican form of government for the Nation, there can be no doubt that they intended Congress, and in particular, the House of Representatives, to be broadly responsive to popular sentiment rather than to state officials' interests. Appellant's rule would permit state legislators to block popular lawmaking efforts designed to maintain a close, responsive relationship between the People and their representatives. But "nothing in the Constitution ... supports the idea of state interference with the most basic relation between the National Government and

its citizens, the selection of legislative representatives." *Cook*, 531 U.S. at 528 (Kennedy, J., concurring).

2. Allowing the People to regulate congressional elections through state constitutional lawmaking processes serves principles of federalism

One of the innovations of American government is a flexible system of federalism, whereby a national republic coexists with state governments and each (with limited exceptions) may chart its own course based on the will of its People. *See, e.g.*, Federalist No. 51 (Madison); *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). Properly read, the Elections Clause is consistent with these principles, for it allows the full breadth and diversity of state lawmaking power to be used for the regulation of elections, subject to the intervention of Congress. Appellant's narrow reading of the Clause is inconsistent with a robust system of federalism.

First, it would severely restrict state policymaking. Appellant's rule would, at a minimum, eliminate all regulation of congressional elections by initiative and referendum. That prohibition would not be limited to congressional redistricting; it would bar the People from enacting many kinds of reforms intended to protect the right to vote for Congress. *See infra* pp. 51-54. It is no answer that state legislatures might enact the same kinds of laws; the fundamental insight behind popular lawmaking is that state legislators may be reluctant to enact legislation that would empower and benefit the People. Moreover, the freedom to experiment is one of federalism's greatest benefits. *See Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism .... allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in

shaping the destiny of their own times[.]"); *cf. New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Second, it would restrict the ability of States to structure their policymaking apparatuses as they see fit. Under Appellant's reading, the Elections Clause creates a substantive requirement that all States both have a representative body of elected officials, *and* use only that body to create election legislation. The Framers did not contemplate such an incursion into state lawmaking processes. *See New York* v. *United States*, 505 U.S. 144, 174-177 (1992). They in fact rejected the idea that the Constitution provides "a pretext for alterations in the State governments, without the concurrence of the States themselves." Federalist No. 43 (Madison).

The Framers' general regard for representative government does not support reading the Elections Clause as a straitjacket that confines the ways in which States may allocate their legislative powers. The Framers wished to convince the Nation (and indeed the world) that a large, national republic would be politically stable, and for that reason they extolled the virtues of a *national* legislature. *See* Federalist No. 10 (Madison); *see also* Wood, *The Creation of the American Republic 1776-1787*, at 499-500 (1998). But they did not purport to force their vision on the States. *See* Federalist No. 43 (Madison) ("Whenever the States may choose to substitute other republican forms, they have a right to do so[.]"); *see also Mayor of Phila.* v. *Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974); *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902). And whereas the Framers designed Congress as a representative assembly to avoid the impracticalities of direct democracy on so large a scale, they did not require that the method

of *electing* Representatives be shielded from popular influence. To the contrary, the Framers protected popular influence in the election of Representatives by requiring that Members be chosen frequently and by a broad body of electors. *See* U.S. Const. art. I, § 2, cl. 1.

This deference to the form in which state constitutions define the legislative power is logical because many state constitutions predated the federal constitution. Some had forms markedly different from the federal system. Pennsylvania, for example, had a unicameral legislature and a twelve-member "executive council" in place of a governor. *See* Pennsylvania Constitution of 1776, *in Colonies to Nation 1763-1789*, at 339-345 (Greene, ed. 1975). Other States were admitted to the Union with no constitution at all. *See, e.g., Luther* v. *Borden*, 48 U.S. 1, 35 (1849) (Rhode Island governed under a Royal Charter from King Charles II until the 1840s). To assert that the Elections Clause implicitly requires the States to employ any particular lawmaking process defies historical reality as well as principles of federalism.

3. Permitting the People directly to enact election regulations is consistent with the constitutional conception of a sovereign people

It is a basic tenet of American political theory that all sovereignty flows from the People. *See McCulloch*, 17 U.S. at 404-405. This is no less true of state governments than the national government. *See Thornton*, 514 U.S. at 838 (Kennedy, J., concurring). Appellant's repeated accusation (at 11, 16, 19, 20, 39) that the *People* of the State of Arizona have somehow "usurp[ed]" the state legislature's authority turns this foundational principle on its head.

In fact, acts of popular lawmaking have a special primacy in our legal order. *See* Rakove, *Original Meanings* 101. State constitutional development, energized by the autonomy and flexibility of federalism, has given rise to forms of self-government, such as the initiative, that reassert the primacy of the People in our system of government. *See, e.g.*, Inaugural Address of California Gov. Hiram W. Johnson, Jan. 4, 1911, *in Journal of the Senate of the Legislature of the State of California* 64 (1911) (calling the initiative "the first step in our design to preserve and perpetuate popular government"). Indeed, advocates of direct democracy reforms like the initiative viewed these mechanisms as extensions of Founding Era principles. *See* Dinan, *The American State Constitutional Tradition* 89 (2009) (quoting one New Hampshire advocate as arguing that popular lawmaking would bring "our whole fabric of government into larger fullness in accord with that great foundation principle that all just governments among men derive their power from the consent of the governed"). These legislative mechanisms have often been used for political reform—from women's suffrage to the adoption of the secret ballot. *See infra* pp. 51-54.

As this Court recently reaffirmed, in upholding a measure passed by initiative, "voters exercise[] their privilege to enact laws as a basic exercise of their democratic power." *Schuette*, 134 S. Ct. at 1636. It would be bizarre if the Constitution elevated state elected officials above the polity that constituted them, and allowed them to bypass a self-governing People.[27]

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[27] Congress implicitly sanctioned lawmaking by initiative when it voted to admit Arizona to the Union, after substantial debate over the merits of the State's initiative system. *See, e.g.*, 47 Cong. Rec. 4229 (1911) (Rep. Davenport: "[S]o far as the initiative

4. Appellant misunderstands the nature of the Commission

Viewed in light of these constitutional values, Appellant's arguments directed at the nature of the Commission fail. Appellant argues (at 49) that the Commission is fundamentally undemocratic. But the Commission was *created* by the People and vested by them with legislative power under the Arizona Constitution pursuant to the State's lawmaking process. Congressional districting by a popularly enacted body, which can be disbanded or modified by the People at any time, and which is composed of members mostly chosen by the state legislative leadership, is hardly "dangerous" to the People who created it in the first place. *See, e.g.*, *Letter of Jefferson to William Charles Jarvis, Sept. 28, 1820, in* 12 *The Works of Thomas Jefferson* 161, 163 (1905) ("I know no safe depositary of the ultimate powers of the society but the people themselves.").

Appellant also contends (at 49-51) that redistricting by elected representatives ensures greater citizen representation in the districting process than does the Commission. But the choice made by the People of Arizona to establish the Commission in the first place is powerful evidence that Appellant's contention is false. Indeed, the concern underlying Proposition 106—state legislators entrenching their interests at the People's expense—stretches back to the Founding Era. *See,*

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and referendum are concerned, I am for them[.]"); *id.* at 4120, 4125 (Senate debates); *see also* Leshy, *Making*, 20 Ariz. St. L.J., at 58; *cf. Luther*, 48 U.S. at 42 ("[W]hen the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government[.]")

e.g., 2 *The Records of the Federal Convention of 1787* at 241 (Farrand, ed. 1911) (Madison expressing fear that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mold their regulations as to favor the candidates they wished to succeed"). Meanwhile, Appellant's complaint that the Commission improperly "locks in" the two major parties, even if accurate, ignores this Court's clear statement that States may "enact reasonable election regulations that may, in practice, favor the traditional two-party system." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). At bottom, Appellant cannot reconcile the argument that the Commission is undemocratic with the fact that it was enacted by the People of Arizona themselves, whom the Elections Clause was designed to serve.

F. Appellant's Rule Is Contrary To Longstanding Practice, Will Invalidate Numerous State Laws, And Will Stymie Election Reform

1. The People have long used initiatives to regulate congressional elections

Appellant presents this case as though the use of the initiative to regulate congressional elections were a novel idea. The opposite is true. Voters have used the initiative for more than a century to improve the system of electing Members of Congress. Arizona was a leader in this respect; in 1912, when the State joined the Union, the People of Arizona guaranteed women the right to vote for all elected officials, including Members of Congress. *See* Leshy, *Making*, 20 Ariz. St. L.J., at 111. Even earlier, in 1904, the voters of Oregon adopted by initiative the primary system for nominating congressional candidates. Indeed, primary elections, born of the same reformist impulse as the initia-

tive, were frequent subjects of initiatives in the early twentieth century.[28]

Use of the initiative to reform election laws continues to this day, and Appellant's rule would invalidate numerous state laws regulating many aspects of congressional elections—not just redistricting. Appellant contends (at 47) that, for congressional elections, "the state legislature, subject to generally applicable constraints in the ordinary legislative process, is the body that is to prescribe electoral regulations." That reading of the Elections Clause will render unconstitutional *all* ballot initiatives governing congressional elections.

For example, the People of Ohio amended their constitution over a half-century ago to require voting for individual candidates rather than for party slates. *See* Ohio Const. art. V, § 2a; *State ex rel. Duffy* v. *Sweeney*, 89 N.E.2d 641 (Ohio 1949) (discussing amendment). The People of Arkansas amended their constitution fifty years ago to permit voting machines in addition to the traditional paper ballots.[29] And the electorates of both Ohio and Oregon enacted constitutional amendments decades ago to reduce the period of time in which a person must register to vote prior to an election. *See* Or. Const. art. II, § 2 (20 days); Ohio

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[28] *See* The Initiative and Referendum Institute, *Statewide Initiatives Since 1904–2000*, *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/Statewide%20Initiatives%201904-2000.pdf (last visited Jan. 15, 2015).

[29] *See* Ark. Sec'y of State, 2011 Arkansas Constitution Amendments at 117-121 (quoting Amendment 50 to the Arkansas state constitution), http://www.sos.arkansas.gov/elections/Documents/Constitution%202011%20Amendments.pdf (last visited Jan 15, 2015).

Const. art. V, § 1 (30 days).[30] Appellant offers no reason why those laws—referred to the electorate by the voters, enacted by the voters, and not directly repealable by state legislatures—would survive a decision in their favor. Still other States have constitutional provisions enacted by constitutional conventions requiring voting by most electors to be "secret," "by ballot," or "by secret ballot." App. B, *infra* pp. 11a-23a. Others required their legislatures to create regulations permitting absentee voting, provided for the registration of voters, or mandated that candidates need receive merely a plurality of all votes to prevail in an election. App. B, *infra* pp. 23a-29a. These provisions would all presumably be unconstitutional under Appellant's rule.

A decision in Appellant's favor would also burden States that wish to continue regulating local elections by popular initiative, requiring them to operate two (potentially inconsistent) systems of election laws. Thus, depending on the source of the election regulations, voter registration for state and congressional elections might be available at different places, polls might be open at different times, and ballots might require different formats. Nothing in the Elections

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[30] In recent years too, many States have amended their constitutions to reform election rules. For example, the People of California voted to institute a top-two primary system in 2010. *Chamness* v. *Bowen*, No. CV 11-01479 ODW (FFMx), 2011 WL 3715255, at *1-3 (C.D. Cal. Aug. 23, 2011) (discussing the reform). Although the California legislature referred the matter to California voters, it is not clear that the top-two primary system would be valid under Appellant's rule since the state legislature is unable modify or repeal it without a vote of the People. *See* Cal. Const. art. 18, §§ 1, 4. And Mississippi's recent adoption of Voter ID laws by initiative, *see, e.g.*, Mott, *Where Voter ID Stands in Mississippi*, Jackson Free Press (Aug. 29, 2012), would also be unconstitutional under Appellant's rule.

Clause condemns the States to such inefficiency. *See Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986).

2. A decision in Appellant's favor would stymie political reform

Arizona, like several other States, has concluded that partisan political gerrymandering seriously undermines public confidence in political institutions.[31] Faced with legislative gridlock and this Court's disinclination to adjudicate partisan gerrymandering claims, *see Vieth*, 541 U.S. at 268, 292, the People of Arizona have turned to the best, and perhaps the only, practical method of reforming politics—one based in the democratic process. *E.g.*, *id.* at 363 (Breyer, J., dissenting) ("[W]here state governments have been unwilling or unable to act, 'an informed, civically militant electorate,' has occasionally taken matters into its own hands, through ballot initiatives or referendums." (quoting *Baker* v. *Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting))).

Appellant's submission, if accepted, would bring those reform efforts to an abrupt end, perhaps forever. If, as Appellant suggests (at 39-40), congressional election regulations must be "prescribe[d]" by elected state

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[31] There was no disagreement among the Justices of this Court in *Vieth* that "severe partisan gerrymanders" are incompatible with "democratic principles." 541 U.S. at 292 (Scalia, J.) (plurality opinion); *id.* at 312, 316-317 (Kennedy, J., concurring in the judgment) ("The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government[.]."); *id.* at 326, 330 (Stevens, J., dissenting) ("Gerrymanders subvert that representative norm[.]"); *id.* at 345 (Souter, J., dissenting) ("[P]artisan redistricting has damaged the democratic process[.]"); *id.* at 361 (Breyer, J., dissenting) ("The democratic harm of unjustified entrenchment is obvious.").

officials, then it is difficult to see how any serious effort at eliminating partisan gerrymandering can survive, for no entity other than the legislature could draw the final congressional district maps. Arizona and California have independent redistricting commissions created by initiative, but five other States have politician-appointed commissions that would also be at risk. Although amicus NCSL suggests those commissions are valid because they provide state legislatures with the "unfettered" ability to appoint commissioners, NCSL Br. 5, 17, 23, in fact, four of those States place popularly enacted limits on who can be appointed, based on considerations such as political party and prior political service. App. C, *infra* pp. 31a-39a; *see also* NCSL Br. 17 n.83. Those commissions are also at risk under NCSL's rule—and they would be even if the NCSL were right as a factual matter, for in those States the legislature still does not enact district lines.

Appellant's reading of the Constitution, as prohibiting the People from removing an obstacle to their full representation in Congress, is a counsel of despair. It would fortify the suspicion that nothing can be done to make the National Government more responsive to the People. The Court should turn aside that submission and allow the People to exercise the "democratic power," *Schuette*, 134 S. Ct. at 1636, which is the lifeblood of the Republic.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 4, cl. 1

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

2 U.S.C. § 2a—Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

* * *

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law

of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Ariz. Const.

art IV—Legislative Department

pt. 1—Initiative and Referendum

§ 1—Legislative authority; initiative and referendum

(1) Senate; house of representatives; reservation of power to people. The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

(2) Initiative power. The first of these reserved powers is the initiative. Under this power ten per centum of the qualified electors shall have the right to propose any measure, and fifteen per centum shall have the right to propose any amendment to the constitution.

* * *

(5) Effective date of initiative and referendum measures. Any measure or amendment to the constitution proposed under the initiative, and any measure to which the referendum is applied, shall be referred to a vote of the qualified electors, and shall become law when approved by a majority of the votes cast thereon and upon proclamation of the governor, and not otherwise.

* * *

(15) Legislature's right to refer measure to the people. Nothing in this section shall be construed to deprive or limit the legislature of the right to order the submission to the people at the polls of any measure, item, section, or part of any measure.

* * *

pt. 2—The Legislature

§ 1—Senate; house of representatives; members; special session upon petition of members; congressional and legislative boundaries; citizen commissions

* * *

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for

three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

(4) The commission on appellate court appointments shall nominate candidates for appointment to the independent redistricting commission, except that, if a politically balanced commission exists whose members are nominated by the commission on appellate court appointments and whose regular duties relate to the elective process, the commission on appellate court appointments may delegate to such existing commission (hereinafter called the commission on appellate court appointments' designee) the duty of nominating members for the independent redistricting commission, and all other duties assigned to the commission on appellate court appointments in this section.

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. Each such official shall have a seven-day period in which to make an appointment. Any official who fails to make an appointment within the specified time period will forfeit the appointment privilege. In the event that there are two or more minority parties within the house or the senate, the leader of the largest minority party by statewide party registration shall make the appointment.

(7) Any vacancy in the above four independent redistricting commission positions remaining as of March 1 of a year ending in one shall be filled from the pool of nominees by the commission on appellate court appointments or its designee. The appointing body shall strive for political balance and fairness.

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or its designee, striving for political bal-

ance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair.

(9) The five commissioners shall then select by majority vote one of their members to serve as vice-chair.

(10) After having been served written notice and provided with an opportunity for a response, a member of the independent redistricting commission may be removed by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

(11) If a commissioner or chair does not complete the term of office for any reason, the commission on appellate court appointments or its designee shall nominate a pool of three candidates within the first thirty days after the vacancy occurs. The nominees shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment, and the appointment other than the chair shall be made by the current holder of the office designated to make the original appointment. The appointment of a new chair shall be made by the remaining commissioners. If the appointment of a replacement commissioner or chair is not made within fourteen days following the presentation of the nominees, the commission on appellate court appointments or its designee shall make the appointment, striving for political balance and fairness. The newly appointed commissioner shall serve out the remainder of the original term.

(12) Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting com-

mission shall conduct business in meetings open to the public, with 48 or more hours public notice provided.

(13) A commissioner, during the commissioner's term of office and for three years thereafter, shall be ineligible for Arizona public office or for registration as a paid lobbyist.

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

A. Districts shall comply with the United States Constitution and the United States voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;

F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping pro-

cess but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

(16) The independent redistricting commission shall advertise a draft map of congressional districts and a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. Either or both bodies of the legislature may act within this period to make recommendations to the independent redistricting commission by memorial or by minority report, which recommendations shall be considered by the independent redistricting commission. The independent redistricting commission shall then establish final district boundaries.

(17) The provisions regarding this section are self-executing. The independent redistricting commission shall certify to the secretary of state the establishment of congressional and legislative districts.

(18) Upon approval of this amendment, the department of administration or its successor shall make adequate office space available for the independent redistricting commission. The treasurer of the state shall make $6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote.

(19) The independent redistricting commission, with fiscal oversight from the department of administration or its successor, shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(20) The independent redistricting commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the independent redistricting commission. The independent redistricting commission shall have sole authority to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan.

(21) Members of the independent redistricting commission are eligible for reimbursement of expenses pursuant to law, and a member's residence is deemed to be the member's post of duty for purposes of reimbursement of expenses.

(22) Employees of the department of administration or its successor shall not influence or attempt to influence the district-mapping decisions of the independent redistricting commission.

(23) Each commissioner's duties established by this section expire upon the appointment of the first member of the next redistricting commission. The independent redistricting commission shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.

art XXI—Mode of Amending

§ 1—Introduction in legislature; initiative petition; election

Any amendment or amendments to this constitution may be proposed in either house of the legislature, or by initiative petition signed by a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for governor at the last preceding general election. Any proposed amendment or amendments which shall be introduced in either house of the legislature, and which shall be approved by a majority of the members elected to each of the two houses, shall be entered on the journal of each house, together with the ayes and nays thereon. When any proposed amendment or amendments shall be thus passed by a majority of each house of the legislature and entered on the respective journals thereof, or when any elector or electors shall file with the secretary of state any proposed amendment or amendments together with a petition therefor signed by a number of electors equal to fifteen per centum of the total number of votes for all candidates for governor in the last preceding general election, the secretary of state shall submit such proposed amendment or amendments to the vote of the people at the next general election (except when the legislature shall call a special election for the purpose of having said proposed amendment or amendments voted upon, in which case the secretary of state shall submit such proposed amendment or amendments to the qualified electors at said special election,) and if a majority of the qualified electors voting thereon shall approve and ratify such proposed amendment or amendments in said regular or special election, such amendment or amendments shall become a part of this constitution.

* * *

APPENDIX B

STATE CONSTITUTIONAL PROVISIONS GOVERNING ELECTIONS

State Constitutional Provisions Requiring Voting By Ballot

Ala. Const. art. VIII, § 177, cl. (d) (1901), *as amended* (2012)

(d) The right of individuals to vote by secret ballot is fundamental. Where state or federal law requires elections for public office or public votes on referenda, or designations or authorizations of employee representation, the right of individuals to vote by secret ballot shall be guaranteed.

Alaska Const. art. V, § 3 (1956)

Section 3. Methods of Voting; Election Contest

Methods of voting, including absentee voting, shall be prescribed by law. Secrecy of voting shall be preserved. The procedure for determining election contests, with right of appeal to the courts, shall be prescribed by law.

Ariz. Const. art. VII, § 1 (1912)

1. Method of voting; secrecy

All elections by the people shall be by ballot, or by such other method as may be prescribed by law; Provided, that secrecy in voting shall be preserved.

Ark. Const. amend. 50, § 2 (1962)

§ 2. Elections by ballot or voting machine required

All elections by the people shall be by ballot or by voting machines which insure the secrecy of individual votes.

Cal. Const. art. II, § 7 (1879), *as amended* 1976

Sec. 7. Voting shall be secret

Colo. Const. art. VII, § 8 (1876), *as amended* 1945

Section 8. Elections by ballot or voting machine. All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested election in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.

Conn. Const. art. VI, § 5 (1965)

Sec. 5. In all elections of officers of the state, or members of the general assembly, the votes of the electors shall be by ballot, either written or printed, except that voting machines or other mechanical devices for voting may be used in all elections in the state, under such regulations as may be prescribed by law. No voting machine or device used at any state or local election shall be equipped with a straight ticket device. The right of secret voting shall be preserved.

Del. Const. art. V, § 1 (1897)

Section 1. The general election shall be held biennially on the Tuesday next after the first Monday in the month of November, and shall be by ballot; but the General Assembly may by law prescribe the means, methods and instruments of voting so as best to secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat.

Fla. Const. art. VI, § 1 (1968), *as amended* 1998

Section 1. Regulation of Elections.

All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Ga. Const. art. II, § 1, ¶ 1 (1983)

Paragraph I. Method of Voting. Elections by the people shall be by secret ballot and shall be conducted in accordance with procedures provided by law.

Haw. Const. art. II, § 4 (1978)

Section 4. The legislature shall provide for the registration of voters and for absentee voting and shall prescribe the method of voting at all elections. Secrecy of voting shall be preserved; provided that no person shall be required to declare a party preference or nonpartisanship as a condition of voting in any primary or special primary election. Secrecy of voting and choice

of political party affiliation or nonpartisanship shall be preserved.

Idaho Const. art. VI, § 1 (1890)

§ 1. Secret ballot guaranteed. All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect.

Ill. Const. art. III, § 4 (1970)

Section 4. Election Laws

The General Assembly by law shall define permanent residence for voting purposes, insure secrecy of voting and the integrity of the election process, and facilitate registration and voting by all qualified persons. Laws governing voter registration and conduct of elections shall be general and uniform.

Ind. Const. art. II, § 13 (1851)

Section 13. All elections by the *People* shall be by ballot; and all elections by the General Assembly, or by either branch thereof, shall be *viva voce*.

Iowa Const. art. II, § 6 (1857)

Sec. 6. All elections by the people shall be by ballot.

Kan. Const. art. IV, § 1 (1861), *as amended* 1974

§ 1. Mode of voting

All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide.

Ky. Const. § 147 (1891), *as amended* 1944

Sec. 147. The General Assembly shall provide by law for the registration of all persons entitled to vote in cities and towns having a population of five thousand or more; and may provide by general law for the registration of other voters in the State. Where registration is required, only persons registered shall have the right to vote. The mode of registration shall be prescribed by the General Assembly. In all elections by persons in a representative capacity, the voting shall be viva voce and made a matter of record; but all elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited, or any person absent from the county of his legal residence, or from the state, may be permitted to vote in a manner provided by law. Counties so desiring may use voting machines, these machines to be installed at the expense of such counties. The word "elections" in this section includes the decision of questions submitted to the voters, as well as the choice of officers by them. The General Assembly shall pass all necessary laws to enforce this section, and shall provide that persons illiterate, blind, or in any way disabled may have their ballots marked or voted as herein required.

La. Const. art. XI, § 2 (1974)

Section 2. In all elections by the people, voting shall be by secret ballot. The legislature shall provide a method for absentee voting. Proxy voting is prohibited. Ballots shall be counted publicly and preserved inviolate as provided by law until any election contests have been settled. In all elections by persons in a representative capacity, voting shall be viva-voce.

Me. Const. art. II, § 1 (1819)

Sec. 1. Every male citizen of the United States of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this State for the term of three months next preceding any election, shall be an elector for Governor, Senators and Representatives, in the town or plantation where his residence is so established; and the elections shall be by written ballot. But persons in the military, naval or marine service of the United States, or this State, shall not be considered as having obtained such established residence by being stationed in any garrison, barrack, or military place, in any town or plantation; nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the town or plantation where such seminary is established. No person, however, shall be deemed to have lost his residence by reason of his absence from the State in the military service of the United States, or of this State.

Md. Const. art. I § 1 (1867), *as amended* 2008

Section 1. All elections shall be by ballot. Except as provided in Section 3 of this article, every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which the citizen resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until the person shall have acquired a residence in another election district or ward in this State.

Mich. Const. art. II, § 4 (1963)

Sec. 4. The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

Minn. Const. art. VII, § 6 (1957)

Sec. 6. All elections shall be by ballot except for such town officers as may be directed by law to be otherwise chosen.

Miss. Const. art. XII, § 240 (1890)

Sec. 240. All elections by the people shall be by ballot.

Mo. Const. art. VIII § 3 (1945), *as amended* 1976

§ 3. Methods of voting—secrecy of ballot—exceptions

All elections by the people shall be by ballot or by any mechanical method prescribed by law. All election officers shall be sworn or affirmed not to disclose how any voter voted; provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers

may be required to testify and the ballots cast may be opened, examined, counted, and received as evidence.

Mont. Const. art. IV, § 1 (1889)

Section 1. Ballot. All elections by the people shall be by secret ballot.

Neb. Const. art. VI § 6 (1875), *as amended* 1972

Sec. 6. Votes, how cast. All votes shall be by ballot or by other means authorized by the Legislature whereby the vote and the secrecy of the elector's vote will be preserved.

Nev. Const. art. II § 5 (1864)

Sec. 5. Voting by ballot; voting in elections by legislature.

All elections by the people shall be by ballot, and all elections by the Legislature, or by either branch thereof shall be "Viva-Voce."

N.M. Const. art. VII, § 5 (1910), *as amended* 2004

Sec. 5. A. All elections shall be by ballot.

N.Y. Const. art. II, § 7 (1939), *as amended* 2002

§ 7. [Manner of voting; identification of voters]

All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved. The legislature shall provide for identification of voters through their signatures in all cases where personal registration is required and shall also provide for the signatures, at the time of voting, of all persons voting in person by ballot or voting machine,

whether or not they have registered in person, save only in cases of illiteracy or physical disability.

N.C. Const. art. VI, § 5 (1970)

Sec. 5. Elections by people and General Assembly

All elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce. A contested election for any office established by Article III of this Constitution shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law.

N.D. Const. art. II, § 1 (1978)

Section 1.

The general election of the state shall be held biennially as provided by law.

Every citizen of the United States, who has attained the age of eighteen years and who is a North Dakota resident, shall be a qualified elector. When an elector moves within the state, he shall be entitled to vote in the precinct from which he moves until he establishes voting residence in another precinct. The legislative assembly shall provide by law for the determination of residence for voting eligibility, other than physical presence. No elector shall lose his residency for voting eligibility solely by reason of his absence from the state.

The legislative assembly shall provide by law for secrecy in voting, for absentee voting, for administration of elections and for the nomination of candidates.

Ohio Const. art. V, § 2 (1851)

Section 2. All elections shall be by ballot.

Or. Const. art. II, § 15 (1857)

Section No. 15. In All elections by the Legislative Assembly, or by either branch thereof, votes shall be given openly or viva voce, and not by ballot, forever; and in all elections by the people, votes shall be given openly, or viva voce, until the Legislative Assembly shall otherwise direct.

Pa. Const. art. VII, § 4 (1968)

Methods of Elections; Secrecy in Voting.

All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.

S.C. Const. art. II, § 1 (1971)

§ 1. Elections to be by secret ballot; protection of right of suffrage.

All elections by the people shall be by secret ballot, but the ballots shall not be counted in secret. The right of suffrage, as regulated in this Constitution, shall be protected by laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult, or improper conduct.

S.D. Const. art. VII, § 3 (1889), *as amended* 1974

§ 3. Elections

The Legislature shall by law define residence for voting purposes, insure secrecy in voting and provide for the registration of voters, absentee voting, the administration of elections, the nomination of candidates and the voting rights of those serving in the armed forces.

Tenn. Const. art. IV, § 4 (1870)

Sec. 4. Ballots. In all elections to be made by the General Assembly, the members thereof shall vote viva voce, and their votes shall be entered on the journal. All other elections shall be by ballot.

Tex. Const. art. VI, § 4 (1876), *as amended* 1967

Sec. 4. In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

Utah Const. art. IV, § 8 (1895), *as amended* 2011

Sec. 8. [Ballot to be secret]

(1) All elections, including elections under state or federal law for public office, on an initiative or referendum, or to designate or authorize employee representation or individual representation, shall be by secret ballot.

(2) Nothing in this section may be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, as long as secrecy in voting is preserved.

Va. Const. art. II, § 3 (1971)

Section 3. Method of voting.

In elections by the people, the following safeguards shall be maintained: Voting shall be by ballot or by machines for receiving, recording, and counting votes cast. No ballot or list of candidates upon any voting machine

shall bear any distinguishing mark or symbol, other than words identifying political party affiliation; and their form, including the offices to be filled and the listing of candidates or nominees, shall be as uniform as is practicable throughout the Commonwealth or smaller governmental unit in which the election is held.

In elections other than primary elections, provision shall be made whereby votes may be cast for persons other than the listed candidates or nominees. Secrecy in casting votes shall be maintained, except as provision may be made for assistance to handicapped voters, but the ballot box or voting machine shall be kept in public view and shall not be opened, nor the ballots canvassed nor the votes counted, in secret. Votes may be cast in person or by absentee ballot as provided by law.

Wash. Const. art. VI § 6 (1889)

§ 6. Ballot

All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

W.Va. Const. art. IV § 2 (1872)

2. In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote by either open, sealed or secret ballot, as he may elect.

Wis. Const. art III, § 3 (1986)

Section 3. All votes shall be by secret ballot.

Wyo. Const. art. VI, § 11 (1889)

Sec. 11. Manner of holding elections. All elections shall be by ballot. The legislature shall provide by law

that the names of all candidates for the same office, to be voted for at any election, shall be printed on the same ballot, at public expense, and on election day be delivered to the voters within the polling place by sworn public officials, and only such ballots so delivered shall be received and counted. But no voter shall be deprived the privilege of writing upon the ballot used the name of any other candidate. All voters shall be guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory.

State Constitutional Provisions Requiring A Plurality Of Votes For Victory In All Elections

Ariz. Const. art. VII, § 7 (1912), *as amended* 1992

Sec. 7 In all elections held, by the people, in this State, the person, or persons, receiving the highest number of legal votes shall be declared elected.

Mont. Const. art IV, § 5 (1889)

Section 5. Result of Elections. In all elections held by the people, the person or persons receiving the largest number of votes shall be declared elected.

Or. Const. art II, § 16 (1908)

Section 16. When person declared elected; proportional representation.

In all elections authorized by this constitution until otherwise provided by law, the person or persons receiving the highest number of votes shall be declared elected, but provision may be made by law for elections by equal proportional representation of all the voters for every office which is filled by the election of two or more persons whose official duties, rights and powers

are equal and concurrent. Every qualified elector resident in his precinct and registered as may be required by law, may vote for one person under the title for each office. Provision may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office. For an office which is filled by the election of one person it may be required by law that the person elected shall be the final choice of a majority of the electors voting for candidates for that office. These principles may be applied by law to nominations by political parties and organizations.

State Constitutional Provisions Requiring State Legislatures To Provide For Absentee Voting

Haw. Const. art II § 4 (1978)

Registration; voting

The legislature shall provide for the registration of voters and for absentee voting and shall prescribe the method of voting at all elections. Secrecy of voting shall be preserved; provided that no person shall be required to declare a party preference or nonpartisanship as a condition of voting in any primary or special primary election. Secrecy of voting and choice of political party affiliation or nonpartisanship shall be preserved.

La. Const. art. XI, § 2 (1974)

§2. Secret Ballot; Absentee Voting; Preservation of Ballot

Section 2. In all elections by the people, voting shall be by secret ballot. The legislature shall provide a method for absentee voting. Proxy voting is prohibited. Ballots shall be counted publicly and preserved in-

violate as provided by law until any election contests have been settled. In all elections by persons in a representative capacity, voting shall be viva-voce.

N.D. Const. art. II, § 1 (1978)

Section 1. The general election of the state shall be held biennially as provided by law.

Every citizen of the United States, who has attained the age of eighteen years and who is a North Dakota resident, shall be a qualified elector. When an elector moves within the state, he shall be entitled to vote in the precinct from which he moves until he establishes voting residence in another precinct. The legislative assembly shall provide by law for the determination of residence for voting eligibility, other than physical presence. No elector shall lose his residency for voting eligibility solely by reason of his absence from the state.

The legislative assembly shall provide by law for secrecy in voting, for absentee voting, for administration of elections and for the nomination of candidates.

Penn. Const. art. VII, § 14 (1957), *as amended* 1997

Absentee Voting. Section 14.

(a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county em-

ployee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Mich. Const. art. II, § 4 (1963)

Sec. 4. The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

State Constitutional Provisions Requiring Voter Registration

Mich. Const. art. II, § 4 (1963)

Sec. 4. The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for

identification of candidates for the same office who have the same or similar surnames.

Miss. Const. art XII, § 249 (1890)

Section 249. No one shall be allowed to vote for members of the legislature or other officers who has not been duly registered under the Constitution and laws of this state, by an officer of this state, legally authorized to register the voters thereof. And registration under the Constitution and laws of this state by the proper officers of this state is hereby declared to be an essential and necessary qualification to vote at any and all elections.

N.C. Const. art. VI, § 3 (1971)

Sec. 3. Registration.

Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.

Va. Const. art. II, § 2 (1971)

Section 2. Registration of voters.

The General Assembly shall provide by law for the registration of all persons otherwise qualified to vote who have met the residence requirements contained in this article, and shall ensure that the opportunity to register is made available. Registrations accomplished prior to the effective date of this section shall be effective hereunder. The registration records shall not be closed to new or transferred registrations more than thirty days before the election in which they are to be used.

Applications to register shall require the applicant to provide the following information on a standard form: full name; date of birth; residence address; social security number, if any; whether the applicant is presently a United States citizen; and such additional information as may be required by law. All applications to register shall be completed by or at the direction of the applicant and signed by the applicant, unless physically disabled. No fee shall be charged to the applicant incident to an application to register.

Nothing in this article shall preclude the General Assembly from requiring as a prerequisite to registration to vote the ability of the applicant to read and complete in his own handwriting the application to register.

Wash. Const. art. VI, § 7 (1889)

Section 7 Registration. The legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote; Provided, that this provision is not compulsory upon the legislature except as to cities and towns having a population of over five hundred inhabitants. In all other cases the legislature may or may not require registration as a pre-requisite to the right to vote, and the same system of registration need not be adopted for both classes.

W. Va. Const. art. IV, § 12 (1872), *as amended* 1902

Registration laws provided for.

The Legislature shall enact proper laws for the registration of all qualified voters in this state.

Wyo. Const. art. VI, § 12 (1889)

Sec. 12. Registration of voters required. No person qualified to be an elector of the State of Wyoming, shall be allowed to vote at any general or special election hereafter to be holden in the state, until he or she shall have registered as a voter according to law, unless the failure to register is caused by sickness or absence, for which provisions shall be made by law. The legislature of the state shall enact such laws as will carry into effect the provisions of this section, which enactment shall be subject to amendment, but shall never be repealed; but this section shall not apply to the first election held under this constitution.

APPENDIX C

REDISTRICTING COMMISSIONS WHERE LEGISLATURE IS LIMITED IN WHOM IT CAN APPOINT

Idaho Const. art. III, § 2 (1889), *as amended* 1994

Section 2. MEMBERSHIP OF HOUSE AND SENATE. (1) Following the decennial census of 1990 and in each legislature thereafter, the senate shall consist of not less than thirty nor more than thirty-five members. The legislature may fix the number of members of the house of representatives at not more than two times as many representatives as there are senators. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.

(2) Whenever there is reason to reapportion the legislature or to provide for new congressional district boundaries in the state, or both, because of a new federal census or because of a decision of a court of competent jurisdiction, a commission for reapportionment shall be formed on order of the secretary of state. The commission shall be composed of six members. The leaders of the two largest political parties of each house of the legislature shall each designate one member and the state chairmen of the two largest political parties, determined by the vote cast for governor in the last gubernatorial election, shall each designate one member. In the event any appointing authority does not select the members within fifteen calendar days following the secretary of state's order to form the commission, such members shall be appointed by the Supreme Court. No member of the commission may be an elect-

ed or appointed official in the state of Idaho at the time of designation or selection.

(3) The legislature shall enact laws providing for the implementation of the provisions of this section, including terms of commission members, the method of filling vacancies on the commission, additional qualifications for commissioners and additional standards to govern the commission. The legislature shall appropriate funds to enable the commission to carry out its duties.

(4) Within ninety days after the commission has been organized or the necessary census data are available, whichever is later, the commission shall file a proposed plan for apportioning the senate and house of representatives of the legislature with the office of the secretary of state. At the same time, and with the same effect, the commission shall prepare and file a plan for congressional districts. Any final action of the commission on a proposed plan shall be approved by a vote of two-thirds of the members of the commission. All deliberations of the commission shall be open to the public.

(5) The legislative districts created by the commission shall be in effect for all elections held after the plan is filed and until a new plan is required and filed, unless amended by court order. The Supreme Court shall have original jurisdiction over actions involving challenges to legislative apportionment.

(6) A member of the commission shall be precluded from serving in either house of the legislature for five years following such member's service on the commission.

Mont. Const. art. V, § 14 (1889), *as amended* 1984

Section 14. DISTRICTING AND APPORTIONMENT. (1) The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

(2) In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative and congressional districts. The majority and minority leaders of each house shall each designate one commissioner. Within 20 days after their designation, the four commissioners shall select the fifth member, who shall serve as chairman of the commission. If the four members fail to select the fifth member within the time prescribed, a majority of the supreme court shall select him.

(3) The commission shall submit its plan to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan with the secretary of state and it shall become law. The commission is then dissolved.

N.J. Const. art. 2, § 2 ¶ 1 (1947), *as amended* 1995

1. (a) After each federal census taken in a year ending in zero, the Congressional districts shall be established by the New Jersey Redistricting Commission.

The commission shall consist of 13 members, none of whom shall be a member or employee of the Congress of the United States. The members of the commission shall be appointed with due consideration to geographic, ethnic and racial diversity and in the manner provided herein.

(b) There shall first be appointed 12 members as follows:

(1) two members to be appointed by the President of the Senate;

(2) two members to be appointed by the Speaker of the General Assembly;

(3) two members to be appointed by the minority leader of the Senate;

(4) two members to be appointed by the minority leader of the General Assembly; and

(5) four members, two to be appointed by the chairman of the State committee of the political party whose candidate for the office of Governor received the largest number of votes at the most recent gubernatorial election and two to be appointed by the chairman of the State committee of the political party whose candidate for the office of Governor received the next largest number of votes in that election.

Appointments to the commission under this subparagraph shall be made on or before June 15 of each year ending in one and shall be certified by the respec-

tive appointing officials to the Secretary of State on or before July 1 of that year.

Each partisan delegation so appointed shall appoint one of its members as its chairman who shall have authority to make such certifications and to perform such other tasks as the members of that delegation shall reasonably require.

(c) There shall then be appointed one member, to serve as an independent member, who shall have been for the preceding five years a resident of this State, but who shall not during that period have held public or party office in this State.

The independent member shall be appointed upon the vote of at least seven of the previously appointed members of the commission on or before July 15 of each year ending in one, and those members shall certify that appointment to the Secretary of State on or before July 20 of that year. If the previously appointed members are unable to appoint an independent member within the time allowed therefor, they shall so certify to the Supreme Court not later than that July 20 and shall include in that certification the names of the two persons who, in the members' final vote upon the appointment of the independent member, received the greatest number of votes. Not later than August 10 following receipt of that certification, the Supreme Court shall by majority vote of its full authorized membership select, of the two persons so named, the one more qualified by education and occupational experience, by prior public service in government or otherwise, and by demonstrated ability to represent the best interest of the people of this State, to be the independent member. The Court shall certify that selection to the Secretary of State not later than the following August 15.

(d) Vacancies in the membership of the commission occurring prior to the certification by the commission of Congressional districts or during any period in which the districts established by the commission may be or are under challenge in court shall be filled in the same manner as the original appointments were made within five days of their occurrence. In the case of a vacancy in the membership of the independent member, if the other members of the commission are unable to fill that vacancy within that five-day period, they shall transmit certification of such inability within three days of the expiration of the period to the Supreme Court, which shall select the person to fill the vacancy within five days of receipt of that certification.

Wash. Const. art. II, § 43 (1983)

SECTION 43 REDISTRICTING. (1) In January of each year ending in one, a commission shall be established to provide for the redistricting of state legislative and congressional districts.

(2) The commission shall be composed of five members to be selected as follows: The legislative leader of the two largest political parties in each house of the legislature shall appoint one voting member to the commission by January 15th of each year ending in one. By January 31st of each year ending in one, the four appointed members, by an affirmative vote of at least three, shall appoint the remaining member. The fifth member of the commission, who shall be nonvoting, shall act as its chairperson. If any appointing authority fails to make the required appointment by the date established by this subsection, within five days after that date the supreme court shall make the required appointment.

(3) No elected official and no person elected to legislative district, county, or state political party office may serve on the commission. A commission member shall not have been an elected official and shall not have been an elected legislative district, county, or state political party officer within two years of his or her appointment to the commission. The provisions of this subsection do not apply to the office of precinct committee person.

(4) The legislature shall enact laws providing for the implementation of this section, to include additional qualifications for commissioners and additional standards to govern the commission. The legislature shall appropriate funds to enable the commission to carry out its duties.

(5) Each district shall contain a population, excluding nonresident military personnel, as nearly equal as practicable to the population of any other district. To the extent reasonable, each district shall contain contiguous territory, shall be compact and convenient, and shall be separated from adjoining districts by natural geographic barriers, artificial barriers, or political subdivision boundaries. The commission's plan shall not provide for a number of legislative districts different than that established by the legislature. The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.

(6) The commission shall complete redistricting as soon as possible following the federal decennial census, but no later than January 1st of each year ending in two. At least three of the voting members shall approve such a redistricting plan. If three of the voting members of the commission fail to approve a plan within the time limitations provided in this subsection, the

supreme court shall adopt a plan by April 30th of the year ending in two in conformance with the standards set forth in subsection (5) of this section.

(7) The legislature may amend the redistricting plan but must do so by a two-thirds vote of the legislators elected or appointed to each house of the legislature. Any amendment must have passed both houses by the end of the thirtieth day of the first session convened after the commission has submitted its plan to the legislature. After that day, the plan, with any legislative amendments, constitutes the state districting law.

(8) The legislature shall enact laws providing for the reconvening of a commission for the purpose of modifying a districting law adopted under this section. Such reconvening requires a two-thirds vote of the legislators elected or appointed to each house of the legislature. The commission shall conform to the standards prescribed under subsection (5) of this section and any other standards or procedures that the legislature may provide by law. At least three of the voting members shall approve such a modification. Any modification adopted by the commission may be amended by a two-thirds vote of the legislators elected and appointed to each house of the legislature. The state districting law shall include the modifications with amendments, if any.

(9) The legislature shall prescribe by law the terms of commission members and the method of filling vacancies on the commission.

(10) The supreme court has original jurisdiction to hear and decide all cases involving congressional and legislative redistricting.

(11) Legislative and congressional districts may not be changed or established except pursuant to this section. A districting plan and any legislative amendments to the plan are not subject to Article III, section 12 of this Constitution.

REPLY BRIEF

No. 13-1314

In the
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Arizona

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REPLY BRIEF FOR APPELLANT

The Elections Clause deliberately delegates the primary authority for prescribing regulations for congressional elections, including redistricting, to state legislatures. The Arizona law challenged here just as deliberately takes the redistricting authority away from the Legislature and redelegates it to an unelected and unaccountable commission. The Legislature is clearly the correct party to challenge the redelegation of its constitutionally-delegated authority, and that redelegation just as clearly violates the Elections Clause.

Tellingly, appellees concede traceability and redressability and barely dispute that the Legislature suffered an injury. Instead, they claim that the Legislature needed to engage in actions that were both futile and *ultra vires* under state law in order to challenge the state law as incompatible with the federal Constitution. There is no support for this bizarre exhaustion requirement, and no lack of a concrete context in which to consider the Legislature's challenge. Appellees have promulgated specific maps for congressional elections. The Legislature timely objected that the Constitution gives it that responsibility. Article III requires nothing more. Nor is there any bar to federal-court adjudication of suits between state-government components when a federal statute or constitutional provision delegates a particular federal responsibility to a specific state entity. In that situation, the state entity has standing to vindicate federal law, and the case presents a justiciable federal question.

On the merits, appellees insist that the Elections Clause's specific delegation of authority to "the Legislature thereof" was really just a delegation to the lawmaking authority of the States. But nothing in text, history, or precedent supports that claim. Although the Framers may have used the word "legislature" more capaciously in discussing political theory, they meant exactly what they said in the Constitution when they delegated a particular federal function to state legislatures, rather than to some other part of state government. And while the Framers gave state legislatures a variety of different functions—some involving lawmaking subject to the normal constraints on lawmaking, others involving an electoral or ratifying function inconsistent with a gubernatorial veto—in every case the delegee was the representative body in the States, not some unelected and unaccountable entity. This Court's cases confirm as much.

Appellees also invoke 2 U.S.C. §2a(c), but that nearly moribund statute has no application here. The provision's only arguably relevant subsection—the one applicable to States that gained a seat in the last census—is plainly unconstitutional and does not remotely authorize or validate the redelegation of the Legislature's constitutionally-conferred authority to an unelected commission. If Congress ever passes a statute authorizing such a redelegation, it would (1) look nothing like 2 U.S.C. §2a(c), and (2) be unconstitutional, as this Court has suggested.

Ultimately, appellees are reduced to policy arguments about the virtues of setting election rules via popular initiative and the loss of the last, great

hope for addressing partisan gerrymandering. But this case does not involve an election map enacted via initiative. Rather, it involves a State's effort to redelegate congressional redistricting from one group of state officials who—whatever their other shortcomings—are elected, accountable and handpicked for the task by the Framers, to another group of state officials who share none of those qualities. Plenty of options remain for addressing partisan gerrymandering, with the ultimate backstop being the ability to vote the gerrymanderers out. Appellees prefer to eliminate that check in favor of assurances of independence and non-partisanship, but nothing in their theory prevents the next State from redelegating congressional redistricting to an unaccountable, yet fiercely partisan, assemblage of political operatives. The Framers' answer to the potential manipulation of congressional election rules was to give primary authority to each State's representative legislature subject to revision by the Nation's representative legislature. Well-meaning reformers may have a better idea, but their resort lies in Article V.

ARGUMENT

I. The Legislature Has Standing To Challenge The Complete Divestment Of Its Constitutionally-Conferred Redistricting Authority.

A. The Legislature Has Alleged a Concrete and Particularized Injury.

Appellees do not dispute that appellant has satisfied Article III's traceability and redressability requirements; they claim only that appellant lacks a concrete and particularized injury. Appellees' Br. 19-22. But the concrete and particularized injury suffered by the Legislature is clear. The Elections Clause explicitly confers upon the Legislature the power to "prescribe[] ... Regulations" for congressional elections; the Legislature has just as explicitly been stripped of that power. Far from asserting a generalized grievance "that the State is not following the law," *id.* at 20, the Legislature challenges the usurpation of an explicit authority expressly delegated to it by the Constitution, and does so in the context of specific congressional maps promulgated by a commission exercising the very authority granted to the Legislature by the Constitution. There is nothing abstract about that claim.

Appellees' contrary assertion rests on two manifestly incorrect arguments. *First*, they offer what amounts to an exhaustion argument: the Legislature lacks standing unless it ignores Proposition 106 and the IRC, enacts its own congressional map, and demands that the Secretary of State certify its map. *See id.* at 20-21 & n.10. But there is no question that such action would be flatly illegal under Proposition

106. And there is no requirement that a plaintiff become a lawbreaker in the eyes of state law before she can challenge the state law as inconsistent with the federal Constitution. Such a rule would be particularly inappropriate for state legislators who take an oath to uphold both the state and federal constitutions. When the IRC took concrete actions to exercise power that the federal Constitution expressly delegates to the Legislature, the Legislature's injury was fully ripe. The Legislature did not need to take further actions that would be clearly *ultra vires* under Arizona law.[1]

Those actions would be futile to boot. There was no prospect that the Secretary of State would certify the Legislature's map in lieu of the Commission's. The Arizona courts have already made clear that once the IRC certifies its maps, "the secretary of state *must* use them in conducting the next election." *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 857 (Ariz. Ct. App. 2005) (per curiam) (emphasis added). And the Secretary of State is a party to this suit and has never raised this objection or suggested that legislative maps would be certified. This Court has made clear that a party need not engage in a futile act to establish standing. *See, e.g., Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 944 n.2 (1982) (where plaintiffs "would not have been granted a permit had they

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[1] To the extent that appellees' objections sound more in exhaustion principles than in Article III's injury-in-fact requirement, they are prudential standing considerations that were forfeited when appellees dropped their standing objection. *See* Legislature Br. 15 n.3.

applied for one," failure to apply did "not deprive them of standing to challenge the legality of" permitting regime).

To support this misguided argument, appellees invoke *Raines v. Byrd*, 521 U.S. 811, 823 (1997), and contend that the Legislature must point to "a specific legislative Act" that the Commission has overridden. Br. 20; *accord* U.S. Br. 21. But *Raines* is readily distinguishable on multiple grounds, Legislature Br. 21-22, as appellees never contest and partially concede, Appellees' Br. 22 n.12. And to the extent *Raines* expresses a preference for adjudicating disputes in the context of concrete and specific actions, such concreteness and specificity are provided by the maps promulgated by the IRC. There was no need for the Legislature to enact its own competing maps that would be *ultra vires* under state law. In other words, although the Legislature had standing to challenge Proposition 106 upon its passage, its challenge to specific maps promulgated by the Commission under Proposition 106 ensures there is nothing premature or abstract about the Legislature's challenge to the Commission's exercise of authority the Constitution grants exclusively to the Legislature.

Second, appellees claim briefly (at 21) that even if complete removal of the Legislature's redistricting authority would satisfy Article III, the Legislature "maintains significant control over redistricting." That contention is doubly flawed. First, the Legislature detailed that the usurpation here is complete, *see* Legislature Br. 36-41, and appellees' only response is an irrelevant empirical claim that the Arizona constitution is supposedly easier to amend

than the federal Constitution. But the ability to propose constitutional amendments, whatever their prospects of success, is not the authority to prescribe regulations for federal elections. Second, while the degree of deprivation might matter on the merits, it is irrelevant to standing. Even if the Legislature retained some peppercorn of authority to prescribe election regulations, that would not mean that the deprivation of the lion's share of its authority would not constitute injury-in-fact.

B. Appellees' Eleventh-Hour Alternative Arguments Are No Barrier to the Court's Review.

Perhaps because of the weakness of the standing objection that they previously abandoned, appellees lead off their jurisdictional section with a claim that state entities cannot bring a federal constitutional claim against another state entity. While appellees label this a standing argument, the United States more candidly argues (at 14) that this action "is not justiciable" and belongs in state court. That candor comes at a price, since justiciability arguments fall outside the scope of the question added by this Court. But whatever its proper label, the contention is meritless for two basic reasons.[2]

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[2] In reality, appellees' argument is not jurisdictional at all, but merits-based, as lower courts have held. *See, e.g.*, *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979) (explaining that appellees' cases reflect "substantive interpretations of the constitutional provisions involved," not jurisdictional rules); *accord City of Hugo v. Nichols*, 656 F.3d 1251, 1255 n.4 (10th Cir. 2011). Thus, appellees forfeited this merits argument by not raising it below.

First, there is no sound reason why one state entity cannot bring a constitutional claim against another state entity to vindicate the federal Constitution's allocation of authority between those entities. As appellant has detailed, numerous federal constitutional provisions delegate federal authority to specific state government entities. *See* Legislature Br. 28. This Court has not hesitated to adjudicate claims based on those provisions, *see, e.g.*, *Hawke v. Smith*, 253 U.S. 221 (1920); *Smiley v. Holm*, 285 U.S. 355 (1932); *McPherson v. Blacker*, 146 U.S. 1 (1892); *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000), and has done so even when they were brought in the name of the state against a state official, *see, e.g.*, *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

Appellees invoke precedents recognizing that inferior municipal bodies like cities, counties, and school boards generally cannot bring suit against a State. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1932); *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). But that simply reflects the reality that the Constitution does not expressly confer any powers upon cities, counties, or school boards the way it does upon state legislatures, state executive authorities, and state courts. *See* Legislature Br. 28. Indeed, appellees concede that when a federal statute expressly grants rights to an inferior municipal body, those entities can file suit to vindicate their federal statutory rights against another state entity. *See* Appellees' Br. 18 n.9; *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985). In that situation, a State's

general power to structure its affairs among subordinate entities gives way to the command of federal law. *See, e.g.*, *Lawrence Cnty.*, 469 U.S. at 270; *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.").

That same principle applies, *a fortiori*, when it comes to vindicating the Constitution's specific allocation of certain powers to state legislatures. It would make no sense to think that state bodies can sue other state entities to enforce federal statutes but not the Constitution. The relevant question in each case is whether the particular federal provision—constitutional or statutory—confers a protectable interest to the governmental body that is bringing the claim. *See Gomillion*, 364 U.S. at 343-45.[3]

Second, the broader problem with appellees' jurisdictional argument is that it is indistinguishable

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[3] Appellees' suggestion that there is no precedent for this Court exercising jurisdiction over federal constitutional claims brought by one state entity against another ignores the jurisdictional holding in *Coleman v. Miller*, 307 U.S. 433 (1939). In rejecting jurisdictional objections, this Court distinguished the very municipal-body precedents invoked by appellees, *see id.* at 441 n.6 (citing *Trenton* and *Williams*), and considered the suit brought by state legislators against the secretary of state. Although the Court ultimately found most of the issues to be textually committed to Congress, that conclusion turned on the constitutional claims asserted, not the parties asserting them. And *Hildebrant* and *Smiley* make clear that Elections Clause claims are justiciable.

from, and depends entirely on accepting, appellees' merits arguments. For example, appellees contend (at 16) that "the federal Constitution gives a state legislature no rights against the State itself." But that is precisely the merits question here—whether the Elections Clause's delegation of congressional redistricting authority to "the Legislature" trumps a state law permanently redelegating that authority elsewhere. Likewise, appellees claim (at 17) that "States do not derive their governmental powers from the federal government, but rather from the People." But that is not true of the power to prescribe regulations for congressional elections, which was assigned by the Constitution itself. And appellees contend (at 17) that federal courts "generally have no warrant to interfere with the distribution of powers within a state government," but that general rule does not apply when the federal Constitution expressly delegates a federal responsibility to one part of state government rather than another. In short, appellees' jurisdictional argument turns entirely on such highly disputable points of law going to the merits. While appellant firmly believes it should prevail on the merits, if this Court disagrees, there is no reason to do so as a jurisdictional, rather than merits, ruling.[4]

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[4] Appellees also contend in passing that the Legislature is challenging "the form of government the People of Arizona have chosen for themselves." Appellees' Br. 18. But the People of Arizona are absolutely entitled to "popular lawmaking," *id.* at 19—just not when the result of that lawmaking violates the Constitution.

II. Neither the Elections Clause Nor 2 U.S.C. §2a(c) Permits The Complete Divestment Of The Legislature's Authority To Adopt Congressional Districts.

A. Appellees' Theory Is Completely Unmoored From and Irreconcilable With the Constitutional Text.

Appellees studiously avoid any discussion of the Elections Clause's text until some forty pages into their brief. And even then, appellees completely disregard the definition that *this Court* has repeatedly given the term "the Legislature" in the specific context of the Elections Clause and every other constitutional provision in which it appears: "'the representative body which ma[kes] the laws of the people.'" *Smiley*, 285 U.S. at 365 (quoting *Hawke*, 253 U.S. at 227). The term was "not one of uncertain meaning" at the Founding, and that certain meaning "still" applies today. *Id.* (quoting *Hawke*, 253 U.S. at 227) (quotations omitted). That settled meaning forecloses appellees' suggestions that "the Legislature" in the Elections Clause instead means "'[t]he power that makes laws,'" Br. 40, "state-based lawmaking," *id.* at 23, "all the lawmaking power of the State," *id.* at 38, or various other reformulations (appellees cannot choose just one) of language that is explicit and unambiguous.

Appellees suggest (at 39) that the Framers "often used" the term "Legislature" "capaciously to refer to the entirety of lawmaking power within a polity"—but not when they were allocating particular federal responsibilities to specific entities within a state government. However broadly the Framers may have

used the term "legislature" when discussing political theory or "the Swiss Canton of Zug," Appellees' Br. 39 n.21, when they allocated responsibilities to the "Legislatures of the States" or "the Legislature thereof" in the Constitution, they clearly meant the representative body which makes the law in that State, just as surely as they meant the "Executive Authority" and "Judges" when they allocated responsibilities to them. *See* Legislature Br. 28.

Appellees contend (at 40) that this Court has "rejected" the proposition that the term "must always refer to the State's elected body of representatives." That assertion is deeply flawed. While this Court has made clear that context may dictate the *function* performed by the state legislatures, which in turn may inform the constraints under which "the State's elected body of representatives" operate, it has never suggested that context changes the *meaning* of the term state legislature or permits the redelegation of power expressly conferred on state legislatures to another entity. Thus, when state legislatures serve as electors or ratifiers, they act free from any veto constraint. *See, e.g.*, *Hawke*, 253 U.S. at 229-30. In contrast, when state legislatures are granted a lawmaking function, they act subject to the normal constraints on that legislative function, including the gubernatorial veto or override-by-referendum. *See, e.g.*, *Smiley*, 285 U.S. at 365. But in no context has this Court found that a delegation to state legislatures was a delegation to some different entity, let alone that a State could override the Constitution by permanently redelegating that authority elsewhere. Moreover, this Court has already determined in

Smiley that the legislature means the representative body of the State in the *specific* context at issue here.

The Seventeenth Amendment's reallocation of the power to choose Senators—which appellees must view as an unnecessary exercise—demonstrates the point. Before that amendment, a state legislature's function in choosing Senators was "'electoral,'" Appellees' Br. 41, and others within the State—most obviously, the People—were capable of performing electoral functions. But that did not mean that anyone besides the state legislature—including the People—could have discharged the legislature's constitutionally-assigned electoral function absent a constitutional amendment, as *Hawke* confirms. *See* 253 U.S. at 228 (stating that "the purpose of making the office of Senator elective by the people" could not "be accomplished by a referendum vote"). Likewise, in the Elections Clause context, the state legislature's function is "lawmaking," and others within the State may be able to perform lawmaking functions, but that does not mean that the Legislature's constitutionally-conferred Elections Clause authority can be redelegated to some other entity with lawmaking capabilities absent another constitutional amendment.

Appellees' effort to equate state legislatures with any process of lawmaking permitted by the State suffers from other serious deficiencies. First, it violates the admonition against rendering language deliberately included by the Framers superfluous. Appellees would transform the phrase "shall be prescribed in each State by the Legislature thereof" into "shall be prescribed in each State by [the power

that makes laws in that State]." If "the Legislature thereof" means simply any method for lawmaking allowed by the State, the Framers could just as easily have ended the clause at "in each State." But the reference to "Legislature thereof" was not superfluous. As this Court made clear in an analogous context, that reference "operat[es] as a limitation upon the state in respect of any attempt to circumscribe the legislative power." *McPherson*, 146 U.S. at 25 (discussing art. II, §1, cl. 2); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) (noting parallel duties imposed on state legislatures by art. I, §4, cl. 1 and art. II, §1, cl. 2).

Equally damning, appellees' approach has no limiting principle. *See* Legislature Br. 48-49. Appellees' response to that rather fundamental flaw is tucked away in a footnote, where they argue that the IRC acts as a legislative body not simply because redistricting is a legislative task, but also because the IRC commissioners "exercise discretion and make policy decisions," and their enactments "carry the force of law and have prospective implications." Appellees' Br. 41 n.25 (quotations omitted). But any person or entity given the job of redistricting—whether the governor, the state supreme court, or an unelected redistricting czar—will exercise discretion and make policy decisions with the force of law.

B. Neither *Hildebrant* Nor *Smiley* Supports Appellees' Atextual Reading of the Elections Clause.

Given the massive problems that would result from appellees' construction of the constitutional text, it is unsurprising that no precedent of this Court

supports their view. Appellees nevertheless insist (at 33) that in *Hildebrant* and *Smiley*, this Court held that "the Elections Clause does not bar state entities other than a representative body from prescribing the manner of congressional elections," even to the complete exclusion of that representative body (*i.e.*, the state legislature). Appellees grossly overread both decisions. Each decision did no more than hold that because redistricting is a lawmaking function, state legislatures act pursuant to the normal constraints on *their* lawmaking powers, such as the gubernatorial veto in *Smiley* and override-by-referendum in *Hildebrant*. Here, it is *appellees* that seek to free redistricting from the normal constraints on the Legislature's lawmaking functions, such as the legislators' need to face the voters, by permanently redelegating congressional redistricting to an unaccountable and unelected commission. The idea that *Smiley* and *Hildebrant* support that deviation from the normal lawmaking process gets matters backwards.

Appellees stress (at 34-35) that in *Hildebrant*, the Court rejected the proposition that including a popular check on the state legislature is "repugnant to" the Elections Clause. But appellant makes no comparable claim. The problem with Proposition 106 is not a procedural concern that it originated as an initiative, but the substantive reality that it divests the Legislature of an authority expressly granted to it by the Constitution. And the problem with the IRC's maps is not that they are an indirect product of an initiative, but that they are regulations of congressional elections prescribed by a body that is not the state legislature.

C. 2 U.S.C. §2a(c) Does Not Authorize the Complete Displacement of the Legislature.

Appellees argue that the Court need not reach the straightforward text of the Elections Clause because 2 U.S.C. §2a(c) "permit[s] redistricting by initiative." Appellees' Br. 27. Appellees have never before claimed that §2a(c) resolves this case on the merits, and with good reason. While appellees' "statutory" argument is long on discussion of the legislative history of the since-repealed 1911 Act, it all but omits any discussion of §2a(c)'s text. But that text makes clear that §2a(c) has no application here. The nearly moribund law sets forth default rules for elections when a State fails to redistrict after a decennial census, providing a different default rule depending on whether a State gained, lost, or maintained its number of representatives. Since Arizona gained a ninth seat as a result of the 2010 census, the only even arguably relevant provision of §2a(c) is subsection (2), which sets a default election map of the previous eight districts plus an at-large, state-wide district. As *Branch v. Smith*, 538 U.S. 254 (2003) explains, that default option would plainly be unconstitutional under one-person-one-vote principles. *See* Legislature Br. 54-56. In short, the only arguably applicable provision of §2a(c) is inarguably unconstitutional. That should suffice to dispense with appellees' so-called statutory argument.[5]

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[5] The United States tries to avoid this anomaly by focusing on §2a(c)'s prefatory clause, which it describes (at 28) as "a comprehensive procedure for redistricting." That is a bold claim

For §2a(c) to be relevant at all, it would need to do far more than provide a default rule for the failure to redistrict; it would need to affirmatively authorize states to redistrict through commissions that were fully independent of the state legislature. But if Congress were to pass such a statute, it would raise constitutional questions of the first order. Whatever power Congress has under the second subclause of the Elections Clause, it does not include the authority to override the first subclause. *See* Legislature Br. 56-57. Indeed, this Court said as much in *Smiley*. 285 U.S. at 372 ("Congress ha[s] no power to alter [the Elections Clause]."). [6] And the Framers made the same basic point in responding to anti-federalist fears that the second clause could be used to extend legislative terms beyond their constitutionally-prescribed length. *See* Legislature Br. 56-57. Appellees' only response (at 32) is that "a law extending the terms 'would be a palpable violation of the Constitution.'" Indeed. And a law authorizing States to deprive state legislatures of their constitutionally-conferred role in prescribing regulations for congressional elections and redelegate that authority elsewhere would be an equally palpable

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for a sixteen-word subjunctive fragment; but the prefatory clause is comprehensive only in the sense that it introduces the default rule for every post-census situation, whether the number of seats stays the same, *see* 2 U.S.C. §2a(c)(1), increases, *id.* §2a(c)(2), or decreases, *id.* §2a(c)(3)-(5). When, as here, the number increases, the prefatory clause and §2a(c)(2) together do nothing more or less than prescribe a default rule that is plainly unconstitutional.

[6] Appellees dismiss this as *dicta* (at 29 n.14), but the *very next paragraph* of the decision states that the Court's holding "clearly follows" from the principles just stated. 285 U.S. at 372-73.

violation of the Constitution. In all events, such a law, if it ever passed, would look nothing like §2a(c), and this Court interprets statutes to avoid constitutional problems, not to create them.[7]

In the end, appellees' §2a(c) argument is not really a traditional statutory argument so much as an excuse to highlight a few snippets from the legislative history of the since-repealed 1911 Act. That endeavor will certainly embolden critics of legislative history. Whatever the merits of using the legislative history of the provision directly at issue, or perhaps even the legislative history of a predecessor statute, to invoke the legislative history of a since-repealed statute where its successor statute is not even directly implicated is surely a bridge too far.

In all events, at most appellees' legislative history suggests that the 1911 Congress understood redistricting to be a lawmaking function, *see Smiley*, 285 U.S. at 372-73, and was comfortable with the

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[7] The United States conspicuously does not embrace appellees' constitutional arguments concerning §2a(c). It argues instead (at 32) that the statute "simply validates, for purposes of federal law, the districts adopted under state law." But §2a(c)'s plain text does no such thing; it merely provides a (plainly unconstitutional) default rule for a failure to redistrict. If §2a(c) really were an all-purpose federal-law validator of districts adopted by any state law no matter how otherwise repugnant to the Constitution, then the constitutional issue most certainly could not be avoided. Of course, this constitutionally dubious role for §2a(c) is not only not apparent from its text, but it entirely escaped the notice of nine Justices in *Branch*, all of whom were searching for some continuing role for the provision to avoid finding an implied repeal.

possibility of override-by-referendum as a constraint on that lawmaking function.[8] But that gets appellees no further than *Hildebrant*. And as already emphasized, it is one thing to confirm that state legislatures are subject to the normal constraints on lawmaking when they redistrict, and quite another for a State to redelegate that authority to an unelected and unaccountable entity different from that selected by the Framers. Nothing in the legislative history of the 1911 Act endorses the latter.[9]

D. Appellees' Policy Arguments Do Not Justify Ignoring the Constitution's Plain Terms.

Unable to ground their argument in the text of the Elections Clause, the relevant precedents, or §2a(c), appellees instead rely heavily on dubious theories about the Clause's purpose (at 23-27, 44-46), and equally dubious policy arguments predicting ruin should the Court reverse the entirely unprecedented decision below (at 1-3, 46-55). Appellees' efforts are no match for the Framers' own words in the Constitution and ratifying debates.

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[8] *See, e.g.*, 47 Cong. Rec. 674 (1911) (contending that prior statutory language meant "the people ... have the final determination of all legislation except the creation of congressional districts") (statement of Rep. Crumpacker).

[9] Indeed, the 1911 Senate *rejected* an amendment that would have allowed districts to be drawn "by the legislature thereof, or by the people thereof." *See* 47 Cong. Rec. 3556. That rejected text, while closer to appellees' mischaracterization of the enacted text, is still a far cry from language that would sanction the legislature's permanent ouster from the process in favor of a commission independent from the legislature.

Appellees' grand unifying theory is that the Elections Clause "vests the initial duty to regulate congressional elections in state-based lawmaking, as close to the People as possible, but also authorizes Congress to intervene to prevent state election regulations from being manipulated by state officials." Br. 23. In appellees' view, if only the Framers knew about lawmaking via initiative, they would have placed the power over redistricting directly in the People. This theory has several problems, not the least of which is that the Framers were well aware of direct democracy and had a healthy skepticism about it. Appellees' attempt (at 47-48) to isolate this skepticism as concerned only about direct democracy at the national level rewrites the historical record. To cite just the most colorful example, Madison talked about the city-state of Athens, not any expansive national polity, when he opined that direct democracy would produce a mob even "[h]ad every Athenian citizen been a Socrates." The Federalist No. 55, at 340 (Clinton Rossiter ed., 1961). The Framers were well-acquainted with direct democracy, including its possible use by States, and still made a clear decision to delegate the primary responsibility for congressional election regulations to state legislatures. In doing so, the Framers expressly referenced the legislatures' representative character and defended the Elections Clause as giving parallel lawmaking responsibility to two representative legislatures, at the state and federal levels. *See* Legislature Br. 35-36 (discussing Madison's response to Elections Clause critics).

An equally fundamental problem with appellees' theory that the Framers wanted the redistricting

power to rest directly in the People is that, despite appellees' sweeping rhetoric, that is not what Arizona law prescribes. Proposition 106 did not usher in some brave new world of map drawing by the assembled voters; it permanently transferred the redistricting authority from one group of state officials (elected, accountable, and chosen by both the People and the Framers) to a different group of state officials (unelected, unaccountable to the voters, and chosen by neither the People nor the Framers). Nothing in the Framing-era debates or the purposes of the Elections Clause remotely supports that transfer.[10]

Appellees contend that the Framers reserved a role for Congress to prevent "manipulat[ion]" by "self-interested state officials," such as "state legislatures [that] might try to manipulate the federal elections

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[10] Because this case is about permanent redelegation to an *unelected* commission, appellees' (and amici's) sky-is-falling claims about the threat to popular lawmaking concerning congressional elections are misplaced. They are also wildly overstated. Appellees' lead example (at 51), Arizona's extension of the franchise to women via initiative, implicates the Electors Qualification provision in art. I, §2, cl. 1, not the Elections Clause. The former does not delegate power to state legislatures; it merely uses the qualifications (however established) for voting for the state legislature's most numerous branch as the qualifications for voting in congressional elections in that State. *Hildebrant* preserves popular lawmaking via referendum. And the constitutionality of particular initiatives depends on their details. But whatever the fate of one-off efforts to dictate congressional election rules via initiative, the permanent divestiture and redelegation of the state legislature's constitutionally-conferred authority clearly crosses the constitutional line. *Cf. McPherson*, 146 U.S. at 35 (indicating that authority over presidential electors cannot be permanently wrested from state legislature).

system." Br. 23, 32. There are two problems with that argument. First, there is no reason to think that the Framers would be *more* comfortable with "self-interested state officials" who were unelected and unaccountable to the voters. Second, appellees' argument about the Framers' concerns only makes sense if "the Legislature" in fact means "the state legislature," not the "state lawmaking process."

Appellees' paeans to federalism and popular sovereignty (at 46-49) are easily answered. Of course a state government is free to "chart its own course based on the will of its People." Br. 46. Just not when the result violates the Constitution. *See, e.g.*, *Thornton*, 514 U.S. at 783 (holding Arkansas term-limits initiative unconstitutional); *Truax v. Raich*, 239 U.S. 33, 37 (1915). And the power of States is hardly at its zenith when it comes to the uniquely federal subject of congressional elections. *See, e.g.*, *Thornton*, 514 U.S. at 841-42 (Kennedy, J., concurring).

Appellees' rather breathless suggestion that the IRC is the last bastion against partisan gerrymandering is fundamentally misguided both legally and practically. Legally, the absence of judicially-manageable standards to police partisan gerrymandering should not lead this Court to ignore perfectly manageable standards derived from the plain text of the Elections Clause. And practically, there are ample means of trying to rein in partisan gerrymandering that comply with the Constitution. States are free to adopt redistricting principles that narrow the scope for partisan gerrymandering. And they are free to adopt advisory commissions that put political pressure on the state legislature to adopt

their maps, as some States have done. Congress can use its authority under the Elections Clause to address the problem in the context of congressional elections. And the ultimate check on partisan gerrymandering is the ability to vote the bums out.[11]

But appellees would eliminate that ultimate check by permanently redelegating congressional redistricting authority to unelected and unaccountable officials who cannot be voted out. There is no evidence that Arizona's particular five-member commission has cracked the code and solved the problem of partisan gerrymandering, and some evidence to the contrary. *See* Legislature Br. 58. But, more troubling, there is nothing in appellees' legal theory to prevent the delegation of redistricting authority to an unelected commission dominated by political operatives of a single party. Appellant's opening brief emphasized this disturbing prospect, *id.* at 50, and appellees' failure to respond is telling. There is no response. Once States are free to redelegate the authority the Framers granted to the state legislatures, there is no basis for ensuring that

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[11] Contrary to appellees' suggestion (at 43, 55), Arizona is an outlier in ousting the state legislature from the process entirely. In Washington, for example, "the legislature may amend the redistricting plan" adopted by its commission. Wash. Const. art. II, §43. In New Jersey, state legislators may and do serve on its commission. *See* http://tinyurl.com/NJcommission (listing Assemblywoman Caroline Casagrande and Senator Nilsa Cruz-Perez). Montana has only one congressional district and would be unaffected by a Court ruling (and Idaho and Hawaii have only two). *Only* in Arizona must commission members be selected from a predetermined list that the legislature has no role in formulating.

the new delegees will be independent, non-partisan, or anything else.

As the Framers well understood, while alternatives may sound good in theory, it is hard to beat representative democracy in practice. That is why the Framers gave the primary authority to prescribe regulations for congressional elections to the state legislatures and not some unelected and unaccountable commission. Ultimately, appellees' position is not that this power should be given to the People, but that redistricting is too fraught with difficulties to be entrusted to the normal lawmaking process, and should be given to just such an unelected commission.

This Court has already rejected two efforts to exempt redistricting from the constraints faced by state legislatures in their ordinary lawmaking process. Facing the voters every few years is perhaps the most important of those constraints. Appellees would free redistricting from that constraint and redelegate the authority from an elected and accountable body hand-picked by the Framers to a different group that possesses none of those virtues. As the Court concluded about a different reform-minded initiative in *Thornton*, the option open for appellees' proposal lies in Article V, not in ignoring the plain terms of Article I.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1314

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v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTIONS PRESENTED

1. Do the Elections Clause of the United States Constitution and 2 U.S.C. 2a(c) permit Arizona's use of a commission to adopt congressional districts?

2. Does the Arizona Legislature have standing to bring this suit?

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INTEREST OF THE UNITED STATES

This case involves a suit by a state legislature seeking relief against other state officials based on the assertion that a state popular initiative violates the federal Elections Clause, U.S. Const. Art. I, § 4, Cl. 1. The United States has a substantial interest in the question of the popular initiative's validity, which may turn on the application of an Act of Congress, 2 U.S.C. 2a(c). The United States, which frequently litigates jurisdictional issues in suits against official defendants, also has an interest in addressing the standing question in this case.

STATEMENT

1. The federal Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed

in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. Art. I, § 4, Cl. 1. As this Court has recognized, the second subclause "gives Congress 'comprehensive' authority to regulate the details of [congressional] elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" *Foster* v. *Love*, 522 U.S. 67, 71 n.2 (1997) (quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)).

Beginning in 1842, Congress has repeatedly exercised this authority to generally require that each State, if apportioned more than one congressional Representative, elect its Representatives individually from separate districts. See, *e.g.*, Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491; 2 U.S.C. 2c; *Ex parte Yarbrough*, 110 U.S. 651, 660-661 (1884). From 1862 through 1901, the decennial congressional-apportionment acts imposing that requirement also generally provided that unless or until the "legislature" of a State drew new (or initial) district lines, the State would be required to follow certain default election procedures (involving the use of preexisting districts and, where necessary, at-large elections). See Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28; Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 6; Act of Feb. 9, 1891, ch. 121, § 4, 26 Stat. 736; Act of Jan. 16, 1901 (1901 Act), ch. 93, § 4, 31 Stat. 734.

In drafting the 1911 congressional-apportionment act, Congress recognized an emerging development in several States to supplement the traditional legisla-

ture-based model of lawmaking with a direct lawmaking role for the people, through the processes of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislative acts by the electorate). 47 Cong. Rec. 3508 (1911) (statement of Sen. Burton). The text of the 1911 law accordingly eliminated the statutory reference to redistricting by the state "legislature" and instead directed that, if a State's apportionment of Representatives increased, the State should use the statutory default procedures "until such State shall be redistricted *in the manner provided by the laws thereof.*" Act of Aug. 8, 1911 (1911 Act), ch. 5, § 4, 37 Stat. 14 (emphasis added).[1]

The new language was drafted on the view that "[i]f there is anything which is clearly a distinct denial of the rights of popular government it is a gerrymander," and that to the extent a State generally provided for legislation to be considered by "the whole electorate," such procedures should also be effective in the context of redistricting. 47 Cong. Rec. at 3436 (statement of Sen. Burton). This Court has accordingly recognized that the revised text was "plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative

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[1] The 1911 Act also imposed certain federal requirements on state redistricting. § 4, 37 Stat. 14. And it separately provided that if a State's apportionment of Representatives had stayed the same, it should continue to use its preexisting districts "until such State shall be redistricted as herein prescribed." *Ibid.* The 1911 Act did not address procedures for a decreased number of Representatives, presumably because no State was in that situation. Compare 1901 Act § 1, 31 Stat. 733-734, with 1911 Act § 1, 37 Stat. 14-15.

power for the purpose of creating congressional districts by law." *Ohio* v. *Hildebrant*, 241 U.S. 565, 568 (1916). The amendment's sponsor emphasized that if the "laws and methods of the States * * * include initiative, it is included" within the scope of the amended language as well. 47 Cong. Rec. at 3508 (statement of Sen. Burton).

The current statute governing the apportionment of Representatives to States, which has been in effect at all times relevant to this case, is codified at 2 U.S.C. 2a(c). Using language similar to the 1911 Act, Section 2a(c) provides that certain default election procedures will be followed "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment."

2. In 2000, the people of Arizona passed a popular initiative that amended their state constitution to provide for an independent commission to draw Arizona's congressional districts (as well as its state-legislative districts). J.S. App. 3; see J.A. 50-80. The initiative's sponsors explained that the measure would place redistricting authority "in the hands of a politically neutral commission of citizens who are not active in partisan politics and who will serve without pay to create fair districts that are not 'gerrymandered' for any party's or incumbent's advantage." J.S. App. 43. Supporters of the measure argued, *inter alia*, that it would increase the number of competitive districts in which voters would have a meaningful electoral choice and force representatives to be more responsive to constituents' concerns. J.A. 63-74.

Arizona's general approach to congressional districting is similar to that of several other States, whose constitutions likewise provide for redistricting

by commission. See Cal. Const. Art XXI; Haw. Const. Art. IV, § 2; Idaho Const. Art. III, § 2; N.J. Const. Art. II, § 2; Wash. Const. Art. II, § 43; see also Mont. Const. Art. V, § 14 (same, in State with only one Representative); see generally Nat'l Conference of State Legislatures Amicus Br. 5-17. California, like Arizona, adopted that system by popular initiative. See Voters First Act, 2010 Cal. Legis. Serv. Prop. 20. In the absence of a "judicially enforceable limit" on state legislatures' ability to skew district lines in favor of particular Representatives or political parties, *Vieth* v. *Jubelirer*, 541 U.S. 267, 305 (2004) (plurality opinion), redistricting by commission may serve as the only meaningful check against "severe partisan gerrymanders" that would be "incompatib[le] with democratic principles," *id.* at 292; see *id.* at 316 (Kennedy, J, concurring in the judgment); *id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

The Arizona initiative provides for the creation each decade of an Arizona Independent Redistricting Commission, whose five members have not recently held elected office (other than a school-board position). Ariz. Const. Art. IV, Pt. 2, § 1, ¶¶ 3-8. The leadership of the two main political parties in the state legislature take turns selecting the first four Commission members (who may be partisans) from a slate prepared by the state commission on appellate-court appointments. *Id.* ¶¶ 5-6. The fifth member (the chair) is generally a non-partisan selected from that same slate by the other four. *Id.* ¶ 8. A Commission member may be removed by the governor, with the concurrence of two-thirds of the state senate, "for

substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." *Id.* ¶ 10.

The Commission must start the process of drawing district lines by creating "districts of equal population in a grid-like pattern across the state." Ariz. Const. Art. IV, Pt. 2, § 1, ¶ 14. The Commission then adjusts the grid "as necessary to accommodate" the requirements of the federal Constitution and the Voting Rights Act of 1965 (52 U.S.C. 10101 *et seq.*), and, "to the extent practicable," the goals of equally populous districts; compact and contiguous districts; districts that "respect communities of interest"; districts whose lines reflect "visible geographic features, city, town and county boundaries, and undivided census tracts"; and districts that are politically competitive. Ariz. Const. Art. IV, Pt. 2, § 1, ¶ 14. The Commission may not use "[p]arty registration and voting data" in "the initial phase of the mapping process," but may use it "to test maps for compliance" with the stated redistricting goals. *Id.* ¶ 15. "The places of residence of incumbents or candidates shall not be identified or considered." *Ibid.*

When it completes a "draft map," the Commission must "advertise" that map "to the public" with a public-comment period of at least 30 days. Ariz. Const. Art. IV, Pt. 2, § 1, ¶ 16. Either house of the state legislature may make recommendations to the Commission during that time, and the Commission is required to consider those recommendations. *Ibid.* The Commission must then "establish final district boundaries" and certify their establishment to the Arizona secretary of state. *Id.* ¶¶ 16-17. The boundaries established by the Commission "ha[ve] the force of law," without any need for "ancillary" action by the state

legislature. *Arizona Indep. Redistricting Comm'n* v. *Fields*, 75 P.3d 1088, 1096, 1097 & n.7 (Ariz. Ct. App. 2003); see Ariz. Const. Art. IV, Pt. 2, § 1, ¶ 17 (describing redistricting provisions as "self-executing").

3. In 2012, appellant Arizona State Legislature challenged the popular initiative's constitutionality by filing suit in federal district court against the Commission, its current members, and the Arizona secretary of state. J.S. App. 4; see J.A. 13-49. Appellant alleged that the initiative "violates the Elections Clause * * * insofar as it removes the authority to prescribe the times, places, and manner of congressional elections from the Arizona Legislature." J.A. 22; see J.A. 21-22. Appellant sought a declaration that the initiative is "preempted, null and void"; a declaration that district maps adopted by the Commission are similarly "null and void"; an injunction prohibiting the defendants from "adopting, implementing or enforcing any congressional map" created under the initiative; and any other appropriate relief. J.A. 22-23.

The district court convened a three-judge panel and dismissed the complaint on the merits. J.S. App. 2-23; see 28 U.S.C. 2284(a). The court exercised jurisdiction over the case on the belief that appellant had "demonstrated that its loss of redistricting power constitutes a concrete injury" sufficient for standing under Article III. J.S. App. 5; see *id.* at 5-6. It held, however, that the Elections Clause authorized the popular initiative. J.S. App. 8-19. The court reasoned that decisions of this Court "demonstrate that the word 'Legislature' in the Elections Clause refers to the legislative process used in [a] state, determined by that state's own constitution and laws." *Id.* at 15. Because "[i]n Arizona the lawmaking power plainly

includes the power to enact laws through initiative, * * * the Elections Clause permits the establishment and use" of the Commission. *Id.* at 19.

Judge Rosenblatt concurred in part and dissented in part. J.S. App. 20-23. He agreed that the court had jurisdiction over the case, but believed that the popular initiative unconstitutionally denied the state legislature the "ability to have any outcome-defining effect on the congressional redistricting process." *Ibid.*

4. On appeal, this Court postponed consideration of the jurisdictional question to a hearing on the merits. 135 S. Ct. 46. The Court specified that potential consideration of the merits would include the issue of whether 2 U.S.C. 2a(c) "permit[s] Arizona's use of a commission to adopt congressional districts." *Ibid.*

SUMMARY OF ARGUMENT

I. The district court lacked jurisdiction over this case. At bottom, appellant's asserted injury cannot rest on an unadorned claim of "usurpation" of legislative authority (Appellant's Br. 16), because nothing appears to prevent the Arizona Legislature from enacting its own districting legislation. Instead, the claim of Article III injury must be based on the premise that Arizona's secretary of state would disregard any future district map drafted by the legislature in favor of one promulgated by the Commission. That theory of injury does not satisfy the requirements of Article III.

First, the injury is not "certainly impending," *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). The assumption that the secretary of state would implement the Commission's map over the legislature's is based upon "a highly attenuated chain of possibilities," *ibid.*, and is thus too speculative to

support jurisdiction. It is not clear that the legislature would in fact agree on legislation adjusting or superseding the Commission's map, and it is not clear that any such legislation would survive gubernatorial veto or popular referendum in order to become law. And even if all that occurred, the secretary of state might well implement the districts drawn by the legislature. She has sworn to uphold the federal Constitution and could interpret the Elections Clause, as appellant does, to require use of the legislature's map rather than the Commission's in the event of a conflict.

Second, assuming *arguendo* the asserted injury were imminent, a federal district court is not the proper forum for this intramural state dispute. Although federal separation-of-powers doctrine does not bar this suit, as it would a suit by Congress against the Executive Branch, federalism principles counsel respect for Arizona's own constitutional structure. Arizona's constitution does not appear to grant the state legislature an interest cognizable under Article III in whether the secretary of state would implement its redistricting legislation. The proper course is accordingly to dismiss the suit and allow appellant to refile in state court, with the possibility that, if the state courts find the legislature's interest to be sufficient as a matter of state law for the case to proceed, this Court could then determine whether it can exercise certiorari jurisdiction.

II. Should this Court reach the merits, it should hold that the Commission may draw valid congressional-district maps. Whether or not the Elections Clause inherently permits the people of Arizona to provide for redistricting by independent commission,

Congress has exercised its own authority to take account of the range of state approaches to lawmaking and to allow States to choose the method by which they redistrict.

In 2 U.S.C. 2a(c), Congress prescribed a comprehensive plan for state redistricting, under which a State must follow certain default election procedures "[u]ntil [it] is redistricted in the manner provided by the law thereof." The intent and effect of that provision is to respect a State's own lawmaking procedures and regard as valid under federal law the districts that a State adopts in accordance with its own law, whether or not the state legislature was involved. The language of Section 2a(c) repeats similar language in the 1911 Act's redistricting provision, which was a deliberate departure from Congress's prior practice of recognizing only districts drawn by a State's "legislature." The specific purpose of the change was to acknowledge state experimentation with a more populist approach to lawmaking and to enable the people of a State to use whatever popular-voting mechanisms might be available under state law to resist gerrymandering by the state legislature. The effect of the provision is that such popular measures are "held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Ohio* v. *Hildebrant*, 241 U.S. 565, 568 (1916).

Section 2a(c) is a permissible exercise of Congress's power under the Elections Clause. The Elections Clause confers final authority on Congress to regulate the times, places, and manner of congressional elections. There is no dispute that the Clause covers redistricting, and it is accordingly clear that Congress could draw its own district map for a State if

it so desired. It follows that Congress may also validate under federal law the map that a State, through its own lawmaking process, selects for itself.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER APPELLANT'S SUIT

A. Appellant's Alleged Injury Is Necessarily Premised On A Prediction That State Officials Would Implement The Commission's Redistricting Plan, Rather Than One That Might Be Enacted By The Legislature

At the outset, it is important to identify the precise nature of appellant's claim to Article III standing. To establish Article III standing, a plaintiff must show, *inter alia*, that it has suffered "an injury in fact." *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks and citations omitted) (*SBA List*). In this case, appellant asserts (Br. 16) that it has "suffered an injury in fact in the form of a direct usurpation of its constitutionally-conferred authority to adopt congressional districts." Nothing in the Arizona constitution, however, would appear to prevent the legislature from adopting redistricting legislation. Appellant's real complaint, therefore, is not that its power to enact legislation has been "usurped," but rather the distinct claim that any redistricting legislation it enacts will be ignored by state officials. That is, the claim of injury here is based on a predicted failure of state officials to *enforce* a district map adopted by the legislature, not on any regulation of the legislature's own primary conduct in *enacting* such legislation.

The challenged popular initiative appears to impose no practical obstacle to the legislature simply passing

redistricting legislation that actualizes its view that it is the only entity in the State that may draw district lines. The provisions of the Arizona constitution declaring popular initiatives superior to acts of the legislature, while phrased as limitations on the legislature's authority, see Ariz. Const. Art IV, Pt. 1, § 1, ¶¶ 6(B)-(D) and 14, do not appear in practice to preclude the act of passing legislation—such as a district map that purports either to modify or supplant the Commission's—that conflicts with a popular initiative. See *Arizona Early Childhood Dev. & Health Bd.* v. *Brewer*, 212 P.3d 805, 807 (Ariz. 2009) (en banc) (describing conflicting legislation as "enacted" by "[l]awmakers"); see also *Dobson* v. *State*, 309 P.3d 1289, 1291, 1294 (Ariz. 2013) (similar where popular initiative amended state constitution). Rather, as in the analogous context of the federal Constitution's First Amendment—which is likewise worded as a limitation on legislative authority, see U.S. Const. Amend. I ("Congress shall make no law * * * ")—the apparent effect of the Arizona constitutional provisions is instead to render any such legislation unenforceable. See *Dobson*, 309 P.3d at 1294 (enjoining application of legislation conflicting with popular state-constitutional amendment); *Arizona Early Childhood*, 212 P.3d at 810 (ordering relief reversing effect of provision that conflicted with popular initiative); see also *Arizona Citizens Clean Elections Comm'n* v. *Brain*, 322 P.3d 139, 141 (Ariz. 2014) (addressing claim that law conflicted with popular initiatives in context of request for declaration of its unconstitutionality and preliminary injunction against "implementing" it); *State* v. *Mathis*, 290 P.3d 1226, 1238 (Ariz. Ct. App. 2012) (discussing validity of legislation

on topics covered by self-executing state-constitutional provision).

Because the popular initiative directly affects only the enforcement (not the enactment) of a legislative redistricting plan, appellant cannot establish the necessary "concrete and particularized" injury, *SBA List*, 134 S. Ct. at 2341, merely from the fact that the Commission has drawn, and the secretary of state has implemented, a congressional-district map in the *absence* of a map enacted by the legislature itself. When the legislature has not enacted its own redistricting plan, other officials' actions to fill the legal void cannot amount to a "direct usurpation" (Appellant's Br. 16) of the legislature's assertedly exclusive redistricting power. Appellant acknowledges that even under its view of the Elections Clause, courts may "draw temporary, lawful districting maps if a state legislature fails to do so in a timely fashion." *Id.* at 51 (emphasis omitted). If the legislature itself is not drawing districts, then its asserted interest in its authority to do so is no more impugned by having the districts drawn by the Commission than by a court.

Accordingly, to the extent it could be anything more than a nonjusticiable "generalized grievance" that asserts "every citizen's interest in proper application of the Constitution," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573-575 (1992), appellant's asserted "usurpation" injury must in reality be a claim about how its own future legislative acts would be treated. In particular, it must be a claim that Arizona's secretary of state, in implementing the State's election procedures, would necessarily disregard any redistricting efforts that might be undertaken by the legis-

lature, in favor of the district map promulgated by the Commission.[2]

B. Appellant's Challenge To State Officials' Future Rejection Of Districts Drawn By The Legislature Is Both Speculative And Otherwise Inappropriate For Resolution In Federal District Court

As thus described, the legislature's claim to Article III injury fails for two independent reasons. First, the claim is entirely dependent on future events that may or may not occur. Second, a suit by the legislature against state officials to ensure full implementation of its legislation is not justiciable in federal courts, at least absent further direction from state courts.

1. Any injury to appellant is contingent on future events that may not occur

An alleged injury satisfies Article III only if the plaintiff shows it to be "actual or imminent, not 'conjectural' or 'hypothetical.'" *SBA List*, 134 S. Ct. at 2341 (quoting *Defenders of Wildlife*, 504 U.S. at 560). This Court has "repeatedly reiterated" that a "'threatened injury must be *certainly impending* to constitute injury in fact'" and that "'allegations of *possible* future injury' are not sufficient." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990))

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[2] The secretary of state—the only executive officer whom appellant has sued—is the official to whom the Commission's map is certified, see Ariz. Const. Art. IV, Pt. 2, §1, ¶ 17, and her election-related duties under state law necessarily require use of district lines, see, *e.g.*, Ariz. Rev. Stat. Ann. § 16-311(E) (Supp. 2014) (accepting nomination papers); *id.* § 16-650 (2006) (declaring winners).

(brackets omitted). Where a "theory of standing * * * relies on a highly attenuated chain of possibilities," it "does not satisfy the requirement that threatened injury must be certainly impending." *Id.* at 1148 (citing *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009), and *Whitmore*, 495 U.S. at 157-160).[3] Appellant's theory of injury here depends on just such a hypothetical sequence.

First, both houses of the Arizona legislature would have to agree upon, and vote to adopt, a particular redistricting plan that either amends or replaces the Commission's. Ariz. Const. Art. IV, Pt. 2, § 15. Although Arizona's legislators presumably have the diffuse intention of doing that at some point, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [this Court's] cases require." *Summers*, 555 U.S. at 496 (quoting *Defenders of Wildlife*, 504 U.S. at 564). Appellant has not specifically alleged any standalone tweak that a majority of legislators would make to the Commission's map. Nor has it alleged anything that would concretely establish that a majority of legislators would come together on a particular district map

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[3] This Court has sometimes "found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Amnesty Int'l*, 133 S. Ct. at 1150 n.5. It is unclear whether "the 'substantial risk' standard is relevant and distinct from the 'clearly impending' requirement," *ibid.*, particularly in a case like this one, where the plaintiff's theory of standing does not involve any avoidance or mitigation costs. In any event, the substantial-risk standard, like the certainly-impending standard, cannot be satisfied by an "attenuated chain of inferences." *Ibid.*

drawn from scratch—a task at which legislatures sometimes fail, see, *e.g.*, *Lance* v. *Dennis*, 546 U.S. 459, 460 (2006) (per curiam); *Branch* v. *Smith*, 538 U.S. 254, 258 (2003). The map-drawing task may be all the more difficult here, where many legislators might prefer, for political or other reasons, simply to approve of the work the Commission has already done.

Second, unless the legislature referred its redistricting bill directly to the people for a referendum, the bill would have to be presented to the governor for approval. Ariz. Const. Art. IV, Pt. 2, § 12; *id.* Art. V, § 7. In order for the bill to become law, either the governor would have to sign it, or he would have to leave it undisturbed, or the legislature would have to override the governor's veto by a supermajority vote of each house. *Id.* Art. V, § 7; see *Smiley* v. *Holm*, 285 U.S. 355, 372-373 (1932) (Elections Clause permits gubernatorial veto of congressional-election-related legislation).

Third, whether or not signed by the governor, the measure would have to avoid popular override through Arizona's initiative or referendum procedures. See Ariz. Const. Art. IV, Pt. 1, § 1, ¶¶ 2-6; *Ohio* v. *Hildebrant*, 241 U.S. 565, 568 (1916) (Elections Clause permits rejection of congressional-election-related legislation by referendum). This Court has recognized that the potential for nullification by a third party, such as a judge, may be fatal to a contingent theory of standing. See *Amnesty Int'l*, 133 S. Ct. at 1149-1150.

Finally, Arizona's secretary of state would have to determine that the Commission's map, rather than the legislature's, is the one she must implement. Although *state* law requires the secretary to "use [the Commission's map] in conducting the next election,"

Arizona Minority Coal. for Fair Redistricting v. *Arizona Indep. Redistricting Comm'n*, 121 P.3d 843, 857 (Ariz. Ct. App. 2005) (per curiam), the secretary takes an oath to uphold the superseding requirements of the federal Constitution as well, Ariz. Rev. Stat. Ann. § 38-231(B) and (E)-(F) (2011); see U.S. Const. Art. VI, Cl. 2 (Supremacy Clause); Ariz. Const. Art. II, § 3 (recognizing federal Constitution's supremacy). As an independently elected state-constitutional officer, see Ariz. Const. Art V, § 1, she could reach her own conclusion about the application of the Elections Clause. Should she agree with the state legislature that the Elections Clause requires implementation of the legislature's map, the legislature would not be injured.

In analogous circumstances, the Minnesota secretary of state in *Smiley* v. *Holm*, *supra*, relied on the Elections Clause (erroneously, as this Court later concluded) to insist upon the validity of a congressional-district map passed by the legislature but vetoed by the governor. 285 U.S. at 362. In this case, it is unclear what judgment the Arizona secretary of state would make. Presented with the constitutional issue for the first time in this litigation, her predecessor explicitly "t[ook] no position" on either "the constitutionality" of the popular initiative that created the Commission or "the constitutionality of the Final Congressional Map adopted by" the Commission. 12-cv-01211 Docket entry No. 15, at 1. She herself has not filed anything in the case.

2. A suit by the Arizona legislature concerning the implementation of its legislation is nonjusticiable

Even assuming Arizona's secretary of state were certain to reject a redistricting plan enacted by the

state legislature, the district court would still lack jurisdiction to entertain appellant's request to compel enforcement of its future enactments.

a. In the context of the federal government, the Framers deliberately chose not to adopt a "system in which Congress * * * can pop immediately into court, in [its] institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking." *United States* v. *Windsor*, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting). The structure of the federal Constitution instead reflects the Framers' intention that no branch of the federal government "ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers." *The Federalist No. 48*, at 332 (James Madison) (Jacob E. Cooke ed., 1982). Allowing a federal court to referee a dispute between Congress and the President, in the absence of a claim of injury by a private party, would abandon "the proper—and properly limited—role of the courts in a democratic society," *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (citation omitted); see *Barnes* v. *Kline*, 759 F.2d 21, 47 (D.C. Cir. 1985) (Bork, J., dissenting) ("It is easily demonstrated from several different lines of cases that the doctrine of congressional standing is ruled out by binding Supreme Court precedent."), vacated on other grounds, 479 U.S. 361 (1987).

Article III does not give Congress a cognizable interest, capable of being implemented through the agency of the federal courts, in overseeing the manner in which the Executive Branch interprets and executes the law. For a claim to be "legally and judicially

cognizable," it must, *inter alia*, present a "dispute * * * traditionally thought to be capable of resolution through the judicial process." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997) (internal quotation marks and citation omitted). Judicial resolution of disputes between Congress and the President, however, "is obviously not the regime that has obtained under our Constitution to date." *Id.* at 828; see *id.* at 826-830. In light of the Framers' clearly expressed concern that Congress might "aggrandize itself at the expense of the other two branches," *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976) (per curiam), the Framers would not have added a powerful weapon—enlistment of the Judiciary to compel action by the Executive—to Congress's arsenal without saying so explicitly. See *Barnes*, 759 F.2d at 57 (Bork, J., dissenting). Far from doing so, they instead provided that "once Congress makes its choice in enacting legislation, its participation ends," and it can "thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher* v. *Synar*, 478 U.S. 714, 733-734 (1986).

b. The structural constitutional considerations that undergird the bar on congressional suits against the Executive are not directly applicable here.[4] Federal-court adjudication of this case would not, for

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[4] This case, which involves an asserted conflict between two sources of positive state law (popular initiative and enactment by the legislature), has no analogue in the federal context. Any law that could constrict Congress's authority in an allegedly unconstitutional way would necessarily have been passed by Congress itself and could thus be undone by an Act of Congress. See U.S. Const. Art. I, § 1 (vesting Congress with "[a]ll legislative Powers herein granted"); see also Appellant's Br. 22; *Byrd*, 521 U.S. at 829.

example, impermissibly expand the authority of Congress and the Judiciary at the expense of the President. In addition, a State may give its legislature a wider role in state government than Congress has been given under the federal Constitution—potentially even a role that includes an interest in the implementation and enforcement of state law sufficient for standing under Article III. Cf. *Karcher* v. *May*, 484 U.S. 72, 82 (1987) (recognizing state legislature's authority under state law "to represent the State's interests" by intervening "in defense of a legislative enactment"). Principles of federalism, however, counsel against lightly presuming that a State has given its legislature such a role, when doing so would embroil a federal court in an intragovernmental state dispute like this one. And Arizona law does not clearly indicate that its legislature would have standing here.

Arizona's constitution vests its legislature with "lawmaking power." *Rios* v. *Symington*, 833 P.2d 20, 29 (Ariz. 1992). "[I]n the exercise of that lawmaking power," the Arizona legislature "establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect." *Ibid.* "Once the Legislature has acted, however, it becomes the duty of the Executive to 'take care that the laws be faithfully executed.'" *Ibid.* (quoting Ariz. Const. Art. V, § 4). As this Court made clear in *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013), a plaintiff whose only relationship to a state law arises from "the process of enacting the law" has "no 'personal stake'" in its enforcement. *Id.* at 2662-2663. That principle strongly suggests that the state legislature here lacks a "'particularized' interest sufficient to create a case

or controversy under Article III," *id.* at 2663 (quoting *Defenders of Wildlife*, 504 U.S. at 560 & n.1), in the issue of whether the secretary of state would use its districting plan.

c. Appellant identifies no decision of this Court holding that a state legislature may bring suit in circumstances like this. The Court's decision in *Coleman* v. *Miller*, 307 U.S. 433 (1939)—"[t]he one case in which [the Court has] upheld standing for legislators * * * claiming an institutional injury," *Byrd*, 521 U.S. at 821—provides no support for appellant here. The Court has explained that "*Coleman* stands (at most * * *) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id.* at 823. That is not the situation in this case. As previously noted, appellant has not identified any "specific" redistricting legislation that a sufficient number of state legislators have voted, or would vote, to enact.

Furthermore, the suit in *Coleman*, unlike the suit here, originated in state court, not federal court. See *Byrd*, 521 U.S. at 824 n.8 (noting this and other potential limitations of *Coleman*). In explaining the rationale for federal certiorari jurisdiction, this Court emphasized that the state supreme court in *Coleman* had itself "treated" the legislators' interest "as a basis for entertaining and deciding the federal questions." 307 U.S. at 446. In this case, however, it is by no means clear that the Arizona courts would find the legislature to have standing under state law. The Supreme Court of Arizona has historically recognized

legislative standing under state law only in circumstances involving the procedural requirements by which an act of the legislature, within its state-constitutional authority, becomes law. See *Forty-Seventh Legislature* v. *Napolitano*, 143 P.3d 1023, 1027-1028 (2006) (en banc) (legislature's challenge to allegedly improper gubernatorial line-item veto); see also *Biggs* v. *Cooper*, No. CV-14-0132-PR, 2014 WL 7449757, ¶¶ 8-19 (Dec. 31, 2014) (legislators' challenge to validity of statute that had allegedly required, but not received, a supermajority vote).

In exercising jurisdiction over this case, the district court effectively assumed that the Arizona courts would dramatically expand their prior jurisprudence to recognize an interest of the legislature in overriding the will of its own constituents, as expressed through a popular initiative. It also effectively assumed that such a ruling by the Arizona courts would be sufficient to grant a federal district court jurisdiction over a suit like this in the first instance. Neither assumption was warranted.[5]

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[5] The only decision of this Court appellant cites (Br. 19) involving a district-court suit with different state entities on opposing sides is *Washington* v. *Seattle School District. No. 1*, 458 U.S. 457 (1982). In that case, both school districts and affected private individuals challenged the constitutionality of a popular initiative that prohibited a school-district program. *Id.* at 459-464; see *Seattle Sch. Dist. No. 1* v. *Washington*, 473 F. Supp. 996, 998-999 (W.D. Wash. 1979). This Court did not address jurisdiction, which was clearly present because of the private plaintiffs. In any event, the primary school-district plaintiff was not a purely lawmaking entity with questionable interest in law enforcement, but instead had administrative powers. *Seattle Sch. Dist. No. 1*, 458 U.S. at 459.

d. If appellant's suit could find its way into federal court at all, it should proceed through state court first; if the state courts adjudicate the merits of the federal question, this Court could then decide whether it has certiorari jurisdiction. See *Coleman*, 307 U.S. at 446. The Elections Clause question might also be justiciable in federal court in a suit by a plaintiff with a stronger standing argument (perhaps an incumbent Representative facing a tougher reelection battle after being placed in the same district as another incumbent), with appellant participating as an amicus. But appellant's apparent preference for a federal forum does not in itself provide a sound reason for endorsing its novel standing argument. See *Amnesty Int'l*, 133 S. Ct. at 1154 ("[T]he assumption that if [appellant has] no standing to sue, no one would have standing, is not a reason to find standing.") (citation omitted).

II. UNDER 2 U.S.C. 2a(c), THE COMMISSION MAY DRAW ARIZONA'S CONGRESSIONAL DISTRICTS

If the Court determines that it has jurisdiction over this case, it should affirm the district court's judgment. Regardless of whether the Elections Clause would in itself permit the people of Arizona to create an independent redistricting commission (an issue on which the United States takes no view), Congress's enactment of 2 U.S.C. 2a(c) is an exercise of cooperative federalism that takes account of the range of state approaches to lawmaking and permits States to choose the method by which they redistrict, consistent with each State's unique history and set of political values.

A. Section 2a(c) Adopts A District Map Drawn In Accordance With State Law As The Presumptive District Map Under Federal Law

1. The procedural validity of the Commission's congressional-district map for Arizona follows directly from the text of 2 U.S.C. 2a(c). Section 2a(c) sets forth congressional-election procedures to be followed "[u]ntil a State is redistricted *in the manner provided by the law thereof* after any apportionment" (emphasis added). The intent and effect of the italicized language is to respect, as a matter of federal law, the redistricting procedures adopted by the States. So long as a State has "redistricted in the manner provided by the law thereof"—as Arizona has done by utilizing its constitution's independent-commission procedure—the resulting redistricting plan becomes the presumptive district map under federal law.[6] Were it otherwise, Section 2a(c) would require the State to use one of the statutory default election procedures.

Under the plain text of Section 2a(c), a State can be "redistricted in the manner provided by the law thereof," and thus create congressionally-recognized districts, without the involvement of the state legislature. First, the use of "redistricted" in the passive voice, without specifying who must draw the districts, naturally suggests that the districts are valid if drawn by *any* entity empowered to do so under state law. Second, the phrase "in the manner provided by the

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[6] Because a State is required to comply with the federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map, nothing in Section 2a(c) precludes or affects a challenge to a state district map on the ground that it violates one or more of those federal requirements.

law thereof" does not limit the relevant "law" to acts of the legislature to the exclusion of popularly-adopted state constitutional provisions or statutes.

2. The history of Section 2a(c) confirms the plain import of its text. As previously explained (pp. 2-4, *supra*), Congress's apportionment acts before 1911 had typically provided that default election procedures would apply unless or until a State's "legislature" drew district lines. In the 1911 Act, against the backdrop of state experimentation with increasing levels of popular participation in state lawmaking, Congress jettisoned the prior language in favor of the phrase "until such State shall be redistricted in the manner provided by the laws thereof." § 4, 37 Stat. 14; see 47 Cong. Rec. 3508 (1911). It did so for the precise purpose of allowing the electorate in States that authorized either the referendum or the initiative to use those measures as a bulwark against gerrymandering by the state legislature.

Senator Burton, the sponsor of the new language, declared that "[i]f there is anything which is clearly a distinct denial of the rights of popular government it is a gerrymander," which could "absolutely defeat the will of the people." 47 Cong. Rec. at 3436. He observed that the preexisting statutory phrase "'by the legislature thereof'" restricted States to redistricting by "legislature alone" and amounted to a "distinct and unequivocal condemnation of any legislation by referendum or initiative." *Ibid.* He urged that "[a] due respect to the rights, to the established methods, and to the laws of the respective States requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Ibid.* And he explained

that the new language "gives to each State full authority to employ in the creation of congressional districts its own laws and regulations," *id.* at 3437, thereby "leav[ing] the question" of proper redistricting procedure "to the laws and methods of the States," *id.* at 3508. If, for example, those laws and methods "include initiative, it is included" under the modified language. *Ibid.*[7]

This Court recognized the import of the 1911 Act's new language in *Ohio* v. *Hildebrant*, *supra*, which rejected a claim that Ohio's referendum process was invalid as applied to congressional redistricting legislation. See 241 U.S. at 566-570. Although the holding in *Hildebrant* may ultimately have turned on Ohio's own inherent authority under the Elections Clause, see *Smiley*, 285 U.S. at 372, the Court in *Hildebrant* described the design of the 1911 Act in unequivocal terms. The Court concluded that "[s]o far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject," the challenger's claim was "without merit." 241 U.S. at 568. "[I]t is clear," the Court explained, "that Congress in 1911 * * * expressly modified the phraseology of the previous acts * * * by inserting a clause plainly intended to

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[7] Representative Crumpacker, who had sponsored similar language in the House of Representatives, had likewise emphasized that the altered language would "enable the States that have the institution of initiative and referendum to appeal direct to the people" on the subject of redistricting. 47 Cong. Rec. at 701; see *id.* at 673-675; *id.* at 703 (statement of Rep. Bartholdt). Representative Crumpacker's proposal was initially voted down. *Id.* at 704-705. But the House ultimately agreed to the "somewhat similar" language proposed by Senator Burton. *Id.* at 3604 (statement of Rep. Houston).

provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Ibid.* The Court found that "the legislative history" of the 1911 Act "leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to referendum which is now urged." *Id.* at 568-569.[8]

While the 1911 Act applied only to the reapportionment following the 1910 census, *Wood* v. *Broom*, 287 U.S. 1, 6-7 (1932), Congress used virtually identical language when it enacted Section 2a(c) in 1941. See Act of Nov. 15, 1941, ch. 470, 55 Stat. 761-762. This Court has "often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 589-590 (2010) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)). Congress thus presumably expected that courts would

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[8] The Court has subsequently suggested that Congress, in enacting the 1911 Act, may have believed that the Elections Clause would inherently allow States to use the referendum process in redistricting, even in the absence of congressional legislation. See *Smiley*, 285 U.S. at 371-372. As *Hildebrant* and the legislative history on which it relies make clear, however, Congress intended to exercise its authority to its fullest extent to enable States to employ popular measures in redistricting, even if those measures would not be authorized by the Elections Clause alone.

interpret the relevant language of Section 2a(c) in accordance with *Hildebrant* and the underlying legislative intent recognized in that decision. Indeed, a majority of Justices in *Branch* v. *Smith*, *supra*, recognized the relevance of the early apportionment statutes in the interpretation of the current Section 2a(c). See 538 U.S. at 274 (plurality opinion); *id.* at 293-295 (O'Connor, J., concurring in part and dissenting in part).

3. Appellant errs in relying (Br. 55-56) on the plurality opinion in *Branch* to argue that Section 2a(c) "has no relevance here." As appellant acknowledges (*id.* at 54), the Court in *Branch* directly *rejected* the argument that that Section 2a(c) was implicitly repealed by a later statute. See 538 U.S. at 273-276 (plurality opinion); *id.* at 292-298 (O'Connor, J., concurring in part and dissenting in part). The plurality opinion did observe, in passing, that many of the default election procedures in Section 2a(c)—that is, the procedures that apply when a State is *not* "redistricted in the manner provided by [state] law"—had "become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional." *Id.* at 273-274.[9] That observation, however, has no bearing on the question of *whether* a State has been "redistricted in the manner provided by [state] law," or the effect under federal law of such a redistricting. On its face, Section 2a(c) provides a comprehensive procedure for redistricting: if the State has been "redistricted in the manner provided by [state]

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[9] In particular, 2 U.S.C. 2a(c)(1)-(4) contemplate that a State would continue to use preexisting districts following a new census, which would likely violate the one-person-one-vote principle announced in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

law," those districts are used; otherwise, a different procedure applies for each possible contingency. Regardless of any constitutional infirmities in some of the latter procedures, courts can and should continue to give effect to Congress's manifest intent that when a State has been "redistricted in the manner provided by [state] law"—whether by the legislature or otherwise—the resulting districts are the ones that presumptively will be used to elect Representatives.

Appellant also errs in contending (Br. 55-56) that the plurality opinion in *Branch* limited Section 2a(c)'s reference to "redistrict[ing] in the manner provided by [state] law" to redistricting by courts and legislatures. To the contrary, the *Branch* plurality's construction of the phrase "'[u]ntil a state is redistricted'" to "refer to redistricting by courts as well as legislatures," 538 U.S. at 274, simply confirms that Section 2a(c) imposes no textual restriction on who may redistrict. Although certain statements by the plurality focused only on redistricting by legislatures and courts, and did not mention redistricting by other means (such as popular initiative or independent commission), see *id.* at 274-275, those statements were simply a product of the fact that the only two potential redistricting authorities at issue in *Branch* were the legislature and the courts.

In all, six Justices in *Branch* (everyone who addressed the issue) found the language of Section 2a(c) to extend beyond redistricting by legislatures alone. See 538 U.S. at 274 (plurality opinion); *id.* at 300 n.1 (O'Connor, J., concurring in part and dissenting in part) ("To the extent that courts are part of the 'manner provided by the law thereof,' courts may redistrict."). Appellant offers no plausible textual basis for

why Section 2a(c) would encompass redistricting by courts and legislatures but not redistricting by other lawfully designated actors.

B. Section 2a(c) Is A Permissible Exercise Of Congress's Authority Under The Elections Clause

Congress has direct authority under the Elections Clause to provide that congressional districts adopted "in the manner provided by [state] law" are the districts that should be used for purposes of federal law. As the Court recognized in *Hildebrant*, a challenge to Congress's decision in the 1911 Act to "treat[] the referendum as a part of the legislative power for the purpose of apportionment where so ordained by the state constitution and laws" is the equivalent of asserting "that Congress had no power to do that which from the point of view of § 4 of Article I * * * the Constitution expressly gave the right to do." 241 U.S. at 569; see *Vieth* v. *Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion) (observing that James Madison defended congressional election power as necessary "to check partisan manipulation of the election process by the States").

1. The Elections Clause "has two functions." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013). First, "[u]pon the States it imposes the duty * * * to prescribe the time, place, and manner of electing Representatives and Senators." *Ibid.* Second, "upon Congress it confers the power to alter those regulations or supplant them altogether." *Ibid.* "The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient.'" *Id.* at 2253-2254 (quoting

U.S. Const. Art. I, § 4, Cl. 1 and *Ex Parte Siebold*, 100 U.S. 371, 392 (1880)).

Appellant cannot dispute that the Elections Clause authorizes Congress to itself draw a State's congressional-district boundaries. The proposition that "congressional redistricting" is part of the "times, places, and manner of congressional elections" is central to appellant's argument that the Election Clause's *first* subclause assigns that function to state legislatures in the first instance. Appellant's Br. 23-24; see *Inter Tribal Council*, 133 S. Ct. at 2253 (emphasizing that "'Times, Places, and Manner' * * * are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections'") (quoting *Smiley*, 285 U.S. at 366). It necessarily follows that Congress itself has superseding authority to draw district lines under the Election Clause's *second* subclause. See Appellant's Br. 56 ("The second subclause of the Elections Clause gives Congress the power to override 'such regulations' as the state legislatures prescribe and to make its own regulations of those elections."); see also *Vieth*, 541 U.S. at 275 (plurality opinion) (observing that the Elections Clause "permit[s] Congress to 'make or alter'" the "districts for federal elections"); *Smiley*, 285 U.S. at 366-367 (explaining that the second subclause gives Congress "'a general supervisory power over the whole subject'" by authorizing it to "'make or alter' * * * regulations of the same general character that the legislature of the State is authorized to prescribe") (quoting U.S. Const. Art. I, § 4, Cl. 1 and *Siebold*, 100 U.S. at 387).

2. Congress's authority to draw district lines necessarily encompasses the authority to recognize, for purposes of federal law, the district lines that a State

itself has drawn in accordance with its own law. Congress, when it legislates on a subject within its domain, may assimilate current or future state laws into federal law. See *United States* v. *Sharpnack*, 355 U.S. 286, 293-297 (1958) (upholding the constitutionality of statute prospectively incorporating state criminal law on federal enclaves). And the Constitution allows both Congress and state legislatures to prospectively ratify the decisions of outside actors in the context of election regulation. See *Siebold*, 100 U.S. at 377-399 (upholding statute imposing federal criminal penalties for violations of state election laws); *McPherson* v. *Blacker*, 146 U.S. 1, 24-36 (1892) (appointment of State's presidential electors "in such manner as the legislature thereof may direct" under U.S. Const. Art. II, § 1, Cl. 2 may be carried out through individual-district popular voting); see also Ariz. Rev. Stat. Ann. § 16-411 (Supp. 2014) (providing that county officials will establish precincts and polling places).

Appellant's contention (Br. 56) that the Elections Clause "does not remotely authorize Congress to rewrite the Constitution by authorizing the delegation of the primary authority to prescribe regulations of congressional elections to an entity other than that specified by the Framers in the Constitution" is accordingly misplaced. It is undisputed that "Congress ha[s] no power to alter Article I, section 4," *Smiley*, 285 U.S. at 372, and Section 2a(c) does not attempt to do so. Nor does it attempt to reconfigure the structure of state government. Instead, as applied here, it simply validates, for purposes of federal law, the districts adopted under state law.[10] And nothing could

[10] The operation of Section 2a(c) in this case differs somewhat from the operation of the 1911 Act in *Hildebrant*. In *Hildebrant*,

provide a more natural, legitimate, or respectful source for a State's district map under federal law than the district map approved by the State itself, in the manner provided by state law.

CONCLUSION

The district court's judgment should be vacated and remanded with instructions to dismiss for lack of jurisdiction. In the alternative, it should be affirmed.

Respectfully submitted.

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the State had used the referendum procedure to reject a district map, meaning that no state-law map existed for the federal law to act upon. The Court has accordingly explained that in *Hildebrant*, "the Act of 1911, in its reference to state laws, could but operate as a legislative recognition of the nature of the authority deemed to have been conferred" by the Elections Clause. *Smiley*, 285 U.S. at 372. This case, in contrast, involves a State's adoption of a district map through a process approved by popular initiative. In that circumstance, Section 2a(c) can and does provide that the map should be used for purposes of federal law.

AMICUS CURIAE BRIEF

No. 13-1314

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

—v.—

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve the systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote of every eligible citizen and to prevent partisan manipulation of electoral rules. The Center conducts empirical, qualitative, historic, and legal research on redistricting and electoral practices and has participated in a number of redistricting and voting rights cases before this Court.

The Brennan Center takes an interest in this case because a ruling in favor of the Arizona Legislature would undermine the ability of citizens of the states to combat the persistent problem of gerrymandering and to enact other electoral reforms.

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[1] The parties have consented to the filing of the Amicus Curiae brief, as evidenced by letters of consent filed with the Clerk. Amicus is not related in any way to any party in this case, and no person or entity other than the Amicus has authored any part of, or made any monetary contribution to the preparation of, this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

At stake in this case is the ability of citizens of the states to guard against the pernicious effects of partisan gerrymandering and to pass other election reforms via ballot initiative. Under the Arizona Legislature's novel interpretation, the Elections Clause—designed in part to give Congress the power to combat manipulation of the electoral rules by state legislators—would prohibit the people of Arizona from accomplishing the very same goal by establishing a redistricting commission with the power to draw congressional districts. The Legislature's position finds no support in the text or purpose of the Elections Clause, and it runs contrary to more than two centuries of interpretation and practice.

This Court recently made clear that the Constitution should be interpreted "in light of its text, purposes, and 'our whole experience' as a Nation," and that "the actual practice of Government" should inform that interpretation. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)). Under each of those factors, Arizona's redistricting process is consistent with and permissible under the Elections Clause.

The Arizona Legislature's case depends on narrowly reading the term "legislature" in the Elections Clause to include only institutional legislative assemblies and to exclude the people acting via ballot initiative. But the use of the term "legislature" at the time the Clause was written and debated does not support such a constrained reading.

To the contrary, contemporaneous dictionaries, the constitutional debates, and the diverse state constitutions from the founding era all point to an understanding of the term "legislature" that includes all configurations of a state's legislative power.

A broader definition of "legislature," indeed, is consistent with the purpose of the Elections Clause, which was to empower Congress to override state election rules, not to restrict the ways states enact legislation. The Framers sought a check on politicians who might manipulate the political system, and a safeguard against the states failing to provide for congressional elections. The provision was not written to direct or restrict the ways states enact their laws.

The Legislature's interpretation is also inconsistent with the whole of the nation's experience, including more than two centuries of practice under the Elections Clause. From the founding through to the present day, the people have exercised legislative power in various forms to regulate the times, places, and manner of congressional elections. Citizen initiatives have been regularly used to regulate federal elections for more than a century without complaint. Congress has approved constitutions that included citizen initiative power, including the power to regulate federal elections, and this Court has recognized the validity of election laws passed in this manner. To accept the Legislature's reading would require reversing centuries of experience.

Defining "legislature" so narrowly would deprive the Elections Clause of its textual meaning,

its substantive purpose, and its accepted application throughout history. In its place, the Constitution would be left with a measure far weaker than the one conceived in the founding era and implemented through to the present day. This weakened provision would leave the public with what the authors of the Constitution and the people of Arizona sought to avoid when they respectively wrote the Elections Clause and established the Independent Redistricting Commission: a political system prone to manipulation by entrenched politicians.

ARGUMENT

I. The term "legislature" in the Elections Clause refers to the legislative power, however organized by the states

This Court recently explained that "[t]he Elections Clause has two functions. Upon the States it imposes the duty to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Ariz. v. Inter-Tribal Council of Ariz.*, 133 S. Ct. 2247, 2253 (2013). The question in this case is whether, by using the term "legislature," the Clause regulates states' internal governance and restricts which state actors can fulfill the states' legislative duty to provide for congressional elections.

While the Arizona Legislature suggests that the Court read "legislature" in the Elections Clause to exclude the exercise of legislative power by the people, the text and the history of American

legislatures in the founding era support a different and far broader reading.

A. Founding-era dictionaries define "legislature" as sovereign legislative power rather than a specific form of assembly

Eighteenth-century dictionaries defined "legislature" not as a legislative assembly or chamber but rather as a broader term encompassing lawmaking power. Samuel Johnson's dictionary defined the word simply as "the power that makes laws." Samuel Johnson, *A Dictionary of the English Language*, 2 vols. (1st ed. 1755). Another prominent dictionary defined legislature as "the Authority of making laws, or Power which makes them." Nathan Bailey, *An Universal Etymological English Dictionary* (14th ed. 1757). A third, narrower dictionary definition is still broader than that proposed by the Arizona Legislature in this case: "the persons empowered to make, abolish, alter, or amend the laws of a kingdom or people." Thomas Dyche & William Pardon, *A New General English Dictionary* (12th ed. 1760).

To the extent that this Court's understanding is guided by these sources, they indicate that the word "legislature" carried a broader meaning than simply a body that meets in a state capitol. There is no evidence to support the Arizona Legislature's argument that the term should be narrowly circumscribed to its modern colloquial meaning.[2]

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[2] Notably, while the brief of the Arizona Legislature looks to dictionary definitions to discern the meaning of other words in

B. In the debates over the Elections Clause "legislature" often was used interchangeably with "state" and "state government"

The terminology used during the debates over the Elections Clause further supports a broad interpretation of the term "legislature." In discussing the Clause, the people of the founding era frequently used the word "legislature" interchangeably with "state" and "state government," suggesting they did not understand the term to constrain who within a state could exercise legislative power to regulate congressional elections in the first instance. Indeed, in our search of the *Documentary History of the Ratification of the Constitution Digital Edition*, the terms "state" and "state government" were used roughly half the time in reference to the first part of the Elections Clause.[3]

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the Elections Clause, it is conspicuously silent when it comes to the eighteenth-century meaning of the word "legislature." *See* Appellant's Brief, pp. 31–36.

[3] Our search of the *Documentary History of the Ratification of the Constitution Digital Edition* for the terms "times, places, and manner" and "time, place, and manner" produced a sample of approximately thirty excerpts from state constitutional debates and related materials that discussed the Elections Clause. Of these, seven focused on the term legislature, five discussed the states generally, six were ambiguous or mentioned both terms, and ten mentioned Congress without mentioning the states or legislatures at all. This count excludes those instances where "legislature" is mentioned as a quotation of the provision. This count was complicated by the fact that a number of the historic documents cover multiple topics. The *Documentary History* includes documents from Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York,

For instance, in the Virginia ratification debates, while Delegate Nicholas discussed how "the *State Legislature* [might] not appoint a place for holding elections," later, in the same debate, he refers to the prospect of Congress "chang[ing] the time, place, and manner, established by *the States*." IX *The Documentary History of the Ratification of the Constitution Digital Edition* 920 (John P Kaminski et al. eds., 2009) [hereinafter Kaminski] (emphasis added).

In the same debates, James Madison similarly refers both to "state legislatures" and "state governments" in the context of the Elections Clause. For example, in explaining the need for the Elections Clause, Madison told the Virginia convention that a congressional override was important because were the times, places, and manner of federal elections "exclusively under the controul [sic] of the State Governments, the General Government might easily be dissolved." Yet, he also referred to the "State Legislatures." X Kaminski 1260.[4]

Pennsylvania, Rhode Island, and Virginia, in addition to selected commentaries from other states and the Philadelphia convention. *The Documentary History of the Ratification of the Constitution Digital Edition* (John P. Kaminski et al. eds., 2009).

[4] Other examples include a Massachusetts author who speculated "that the obstinacy of one state might lead them to refuse to elect [congressional representatives] at all" but then describes how "in others the legislature might abuse the inhabitants' with burdensome regulations, V Kaminski 734, and a Pennsylvania pamphleteer referred to the Elections Clause and described how "the time, place, and manner of electing Representatives are to be fixed by each state itself." II Kaminski 216.

C. Founding-era state constitutions had diverse legislative structures and early elements of direct democracy

The actual structure of state legislative power at the time of ratification of the Constitution also supports a broader interpretation of "Legislature" than that urged by the Arizona Legislature. The argument that "legislature" should be narrowly construed, indeed, is flatly inconsistent with the Framers' express rejection of the idea that there should be uniformity in the form of state governments.

During the Revolution, there had been debate both at the Continental Congress and in the states about whether the newly independent states should have uniform constitutions. Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 Suffolk U. L. Rev. 759, 781 (2014). Ultimately, there was no agreement on what such a constitution would look like, and the idea fell by the wayside. *See* Willi Paul Adams, *The First American Constitutions* 55–56 (1980).

Instead, state constitutions differed from one another in many ways, including how they structured legislative power. There was no monolithic model of a "legislature" or the state legislative power. Rhode Island and Connecticut, for example, used their colonial royal charters, with some modifications, well into the nineteenth century. In both states, legislative bodies formally included the governor and assistants. *See* Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation*

of Powers in State Courts, 81 Minn. L. Rev. 1543, 1550 (1997); Richard A. Hogarty, *Separation of Powers in State Constitutional Law, When Legislators Become Administrators: The Problem of Plural Office-Holding*, 4 Roger Williams U. L. Rev. 133, 148 (1998).

Other states, by contrast, had begun to develop a more defined separation of powers. By 1787, New York and Massachusetts allowed governors to exercise a right to veto legislation. Further, a number of states had begun to divide their legislatures into upper and lower chambers, with each chamber elected on a different basis.[5]

Despite differences in the ways they structured legislative processes, however, early state constitutions shared a skepticism about politicians and generally sought to use early versions of direct democracy to ensure that the people and not the political class remained in control. *See* G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition* at 4 (Working Paper), *available at* http://camlaw.rutgers.edu/statecon/publications/people.pdf. These mechanisms arose in the context of a robust Revolutionary-era focus on the nature of representation and a rejection of British notions of indirect "virtual" representation.

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[5] In Massachusetts, for example, the lower house was elected on the basis of population equality, while the number of senators a district elected varied depending on the amount of taxes paid by the people of the district. Mass. Const., part II, ch. 1, § 2, art. 1. Maryland, by contrast, used a system of electors to pick the members of its upper chamber. Md. Const. of 1776, arts. II, XIV, XV.

See Gordon S. Wood, *Creation of the American Republic, 1776-1787* at 162–96 (Rev. ed. 1998).

Consistent with this growing emphasis on representation, and the right of the people to govern themselves, most Revolutionary-era state constitutions contained strong statements that power rested not with politicians in legislatures, but with the people.[6] *See, e.g.*, Va. Const. of 1776, Dec. of Rights, § II ("That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."); Penn. Const. of 1776, Dec. of Rights, § IV; *cf. id.* § III ("That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."); N.C. Const. of 1776, Dec. of Rights, § II ("That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof.").

These early constitutions sought to assure the proximity of government to the people. In five states, citizens of a legislative district could issue binding instructions to their elected representatives, and "the practice was widespread even in states that did not expressly recognize it in their constitutions." G. Alan Tarr, *Understanding State Constitutions* 84 (2000). States took other measures, as well. By 1789, all had moved to annual elections for their lower houses, and seven had adopted annual elections for their upper houses as well, to ensure greater popular control over

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[6] This is mirrored, of course, in the new federal Constitution's invocation of "We the people" in its preamble and in the Ninth Amendment's reservation of rights "retained by the people."

legislative outcomes. *Id.* at 83. Pennsylvania and Vermont (which joined the Union shortly after it was created) required that non-emergency legislation not take effect until there had been an intervening election. *Id.* at 82–83.

II. The word "legislature" should be read consistently with the Elections Clause's purpose, which is to empower Congress to override electoral rules for federal elections, not to restrict the ways states enact legislation

The purpose of the Elections Clause is to give Congress the power to override state electoral rules. All the founding era debates around the provision centered on this issue.

The Framers wanted to empower Congress for two reasons. First, the Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *Inter-Tribal Council of Ariz.*, 133 S. Ct. at 2253 (citing The Federalist No. 59 (Alexander Hamilton)). Equally important, the Clause acted as a safeguard against the possibility that politicians and factions in the states would manipulate electoral rules to preserve their advantages – and, in doing so, prevent the House of Representatives from being the "mirror of the people in miniature" famously envisioned by John Adams. John Adams, *Thoughts on Government*, Apr. 1776 Papers 4:86–93 (discussing the idea that legislatures ideally should closely resemble the people being represented).

This second concern was even more central to the purpose of the Elections Clause because it was rooted in a Revolutionary-era belief in the need for representative governments and the corollary that government works best when it is closest to the people. *See* The Federalist Nos. 59, 61 (Alexander Hamilton). Having just emerged from a Revolution fought in large part because of the unrepresentative nature of the British electoral system, the Framers wanted to make sure that government would actually be representative of the people at large. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution* 167 (1971) (discussing how the colonists came to view British arguments of virtual representation "with derision"); Wood, *supra*, at 176 (discussing how "Americans immediately and emphatically rejected" the idea of virtual representation). They feared that state legislators might manipulate electoral rules to entrench themselves or place their interests over those of the general public just as British political elites had done. *See* Bailyn, *supra* at 167–75 (discussing the weaknesses of the British theories of virtual representation); *infra* p. 14. The Elections Clause was designed as a check against these potential abuses, and as a way to keep government close to the people it represented.[7]

At the Constitutional Convention, Madison was explicit in arguing this rationale. He worried that state legislatures might impose rules to skew

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[7] As the brief for the Arizona Independent Redistricting Commission points out, this proximity to both the federal and state governments "doubly empowered" the public under the Elections Clause. *See* Appellees' Brief, p. 26.

the outcomes of federal elections. Without the Elections Clause, he suggested that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention of 1787, at 241 (M. Farrand rev. ed. 1966) [hereinafter Farrand]. Madison spoke in response to a motion by South Carolina's delegates to strike out the federal power. They did so because that state's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so. Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, 223 (1996).

These arguments were carried into the public debate over ratification. Theophilius Parsons, a delegate at the Massachusetts ratifying convention argued that the Clause was needed to combat what today might be characterized as partisan gerrymandering, when he warned that, "when faction and party spirit run high," a legislature might take actions like "mak[ing] an unequal and partial division of the state into districts for the election of representatives." VI Kaminski 1218. Timothy Pickering of Massachusetts similarly posited that the Clause was necessary because "the State governments may abuse their power, and regulate elections in such manner as would be highly inconvenient to the people, [and] injurious to the common interests of the States." Letter from Timothy Pickering to Charles Tillinghast, Philadelphia, 24 December 1787, *in* XIV Kaminski 197

Fears of such abuses flowed from the Framers' clear eyed understanding of politicians. They were skeptical of many elected officials, especially at the state level, and debaters denounced them as self-interested, self-dealing, and as "Men of indigence, ignorance, & baseness." 1 Farrand 132. In the Constitutional Convention debate over direct election of congressional representatives, James Wilson of Pennsylvania stated, for example, that he did not want to "increase the weight of the State Legislatures by making them the electors of the national Legislature." 1 Farrand 49. Madison, likewise, feared that if state legislatures controlled the appointment of the House of Representatives, "the people would be lost sight of altogether." 1 Farrand 50. Hamilton observed that "State administrations" would be attractive to those "capable of preferring their own emolument and advancement to the public weal." The Federalist No. 59 (Alexander Hamilton).

The common thread in these concerns over political abuses and the men who perpetrated them is that they all would make government more remote from the people and less representative than the Framers believed it should be. The Elections Clause was written to protect that very principle. With the Elections Clause, state politicians would be circumspect. Rufus King and Nathaniel Gorham wrote that because the Clause acted as a check, "the States will do all that is necessary to keep up a Representation of the People; because they know that in the case of omission the Congress will make the necessary provision." Rufus King and Nathaniel Gorham, Response to Elbridge Gerry's Objections,

post-31 October, *in* IV Kaminski 188. Pickering further supported the Clause as a way to "[e]nsure to the *people* their rights of election." Letter from Timothy Pickering to Charles Tillinghast, Philadelphia, 24 December 1787, *in* XIV Kaminski 197.[8]

If the Elections Clause were read in the manner proposed by the Arizona Legislature, it would undermine and pervert the very goal of the clause by giving free rein to elected politicians to do the very thing that people of the founding generation loathed. The driving force behind the Clause was a desire to ensure truly representative government. These were leaders who sought to prevent politicians from manipulating the political system, not grant them the express power to do so.

III. Since the nation's founding, states, this Court, and Congress have understood that states have authority to give the people the ability to regulate the times, places, and manner of congressional elections

In the more than two centuries since 1787, legislative power has been embodied in colonial-era

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[8] At the same time, the Framers understood that, in a sprawling nation, it was not practical for the federal government to be initially responsible for federal election rules. They knew, in Madison's words, that "the state governments [are] best acquainted with the situation of the people" and thus best suited to decide things like where to have polling places, the days of elections, and the like. X Kaminski 1260.

charters, citizen votes on legislation, and the initiative power used to create Arizona's Independent Redistricting Commission. This legislative power often has been used to shape election laws, and Congress and this Court have long acknowledged that power as legitimate.

A. This Court's precedents confirm a sufficiently broad interpretation of "legislature" to encompass the legislation at issue here

Only twice before has this Court construed the first part of the Elections Clause, and in both cases the Court recognized states' flexibility to structure their legislative power in different ways.[9] In both *Hildebrant* and *Smiley*, this Court upheld state legislation under the Elections Clause pursuant to mechanisms that the Framers may not have recognized and that are inconsistent with the definition of "legislature" urged by the Arizona

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[9] Few cases have addressed the Elections Clause. Most address the scope of Congress' power, including the meaning of "Times, Places, and Manner," rather than the allocation of state legislative power. *See, e.g.*, *Ariz. v. Inter-Tribal Council of Ariz.*, 133 S. Ct. 2247 (2013) (upholding Congress's power to override state policies with respect to voter registration in federal elections); *Foster v. Love*, 522 U.S. 67 (1997) (invalidating Louisiana's open primary system because it conflicted with federal law, authorized by Elections Clause, setting a uniform federal Election Day); *Roudebush v. Hartke*, 405 U.S. 15 (1972) (holding that recounts are covered under "times, places, and manner" language); *United States v. Classic*, 313 U.S. 299 (1941) (holding that Elections Clause covers primary elections for federal office); *Ex parte Siebold*, 100 U.S. 371 (1879) (clarifying Congress's supervisory power over federal elections).

Legislature. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Smiley v. Holm*, 285 U.S. 355 (1932).

Hildebrant concerned whether the Elections Clause allowed Ohio's constitution to authorize voters to call a referendum to override the state legislature's redistricting plan. In 1912, Ohio wrote this referendum power into its constitution as part of a package of reforms introduced at a constitutional convention. *Hildebrant*, 241 U.S. at 566; Ohio Const. art. II, § 1. Three years later, the state's legislature passed a set of new congressional districts. Pursuant to the state's new referendum power, the districting plan was submitted to the electorate, which rejected it. The petitioner brought suit to force Ohio to implement the districts, arguing that "the referendum vote was not and could not be a part of the legislative authority of the state, and therefore could have no influence" on congressional redistricting. *Hildebrant*, 241 U.S. at 567.

The Court upheld Ohio's system, holding that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power." *Id.* at 568. The decision further noted that to hold the referendum as invalid under the Elections Clause would "rest upon the assumption that to include the referendum in the scope of the legislative power" would "in effect annihilate[] representative government." *Id.* at 569. The Court was not concerned about whether the legislative mechanism at issue empowered particular state actors, but rather whether that mechanism preserved the representative government that was at the heart of the Framers' concerns.

Similarly, in *Smiley*, the Court addressed the question of whether the Minnesota governor's ability to veto a legislatively approved redistricting plan meant that it had been enacted inconsistently with the Elections Clause. *Smiley*, 285 U.S. at 362. As with the referendum in *Hildebrant*, the Court upheld the governor's veto power as consistent with the Elections Clause. The decision found "no suggestion in [the Elections Clause] of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 367. In so holding, the *Smiley* Court acknowledged the long history of states adopting different legislative forms and the principle that "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning." *Id.* at 369.

As the Arizona Legislature appears to acknowledge, under these decisions, Arizona's redistricting process is plainly constitutional. This Court should decline Appellant's invitation to overrule *Hildebrant* both because the case was correctly decided and because overruling it would upend more than a century of established practice under the Elections Clause.[10]

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[10] In addition to challenging legislation by ballot initiative, the Arizona Legislature argues that the redistricting commission itself has been impermissibly tasked with exercising legislative power. Appellant's Brief, pt. II(C). But that argument proves too much. Nothing in the Elections Clause prohibits a state legislative body from delegating a portion of its legislative power to a committee, agency, or commission. Indeed, state legislatures routinely delegate large swaths of "legislative"

B. Use of initiative to pass electoral laws

As the Court made clear in both *Hildebrant* and *Smiley*, as well as in *Noel Canning* last Term, history does not stop after 1787. *Noel Canning*, 134 S. Ct. at 2559. Rather, "the longstanding 'practice of the government' can inform our determination of 'what the law is.'" *Id.* at 2560. It is also "an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era." *Id.*

Here, the flow of history is clear: states have increasingly allocated ever greater legislative power to the people. That power encompassed the regulation of elections. The initiative that created Arizona's Independent Redistricting Commission stands firmly in that tradition.

As states began to amend their constitutions after 1787, popular sovereignty became increasingly prominent in the state constitutional tradition. The Progressive Era marked the apex of the populism of the state constitutional tradition by institutionalizing the initiative and referendum. In 1898, South Dakota became the first state to adopt these direct democracy devices, with Utah and

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responsibility to regulate federal elections to independent bodies of state and local election officials. And just as state legislatures retain the authority to override decisions by election officials they do not like via legislation, so do the people of Arizona retain the authority to override decisions by the Redistricting Commission via ballot initiatives.

Oregon following suit in 1900 and 1902, respectively. John J. Dinan, *The American State Constitutional Tradition* 85 (2006). By the end of the twentieth century, roughly half of the states had adopted the statutory initiative and/or referendum.[11]

Notably, since the advent of ballot initiatives over a century ago, Americans have regularly and repeatedly used this process to regulate the "times, places, and manner" of congressional elections without formal involvement of institutional legislatures, and without drawing constitutional objections.

For example,[12] in 1904, the people of Oregon passed a ballot initiative establishing a primary system for *all* elections (federal and state). *See* Oregon Primary Nominating Election, Measure 2 (1904).[13] This occurred two years after Oregon established the ballot initiative and six years after the first state adopted the ballot initiative (South

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[11] A list of the current provisions can be found in Dinan, *supra*, at 94 n.151.

[12] Information about the ballot initiatives in this section can be found on the National Conference of State Legislature's Ballot Measure Database. *See Ballot Measures Database*, Nat'l Conf. of State Legis., http://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx (last visited Jan. 22, 2015).

[13] Four years later, Oregon voters used a citizen ballot initiative to require the state legislature to elect the winner of a popular vote as Senator. Allen Hendershott Eaton, *The Oregon System: The Story of Direct Legislation in Oregon* 96 (1912). Although not under the Elections Clause, but under a parallel provision, this exercise of legislative power by the people is consistent with how the people of the states have exercised legislative power under the elections clause.

Dakota). Oregon is not alone; other states including Arkansas and Washington have altered the way candidates—including congressional candidates—are nominated through ballot initiative. *See* Arkansas Primary Laws, Act 1 (1916); Washington Top Two Primaries, Initiative 872 (2004). Ballot initiatives also have been used to affect various others aspects of the "times, places, and manner" of congressional elections. *See, e.g.*, Colorado Headless Ballot, Measure 14 (1912) (placing names of candidates on ballot without reference to their party affiliation); Washington Repeal of Poll Tax, Initiative 40 (1922) (repealing annual poll tax used in congressional elections); California Registration of Voters, Proposal 14 (1930) (providing for permanent voter registration, including for federal elections); Ohio Individual Voting for Candidates, Amendment 2 (1949) (arranging candidates on ballot by position they were running for, rather than by party); Arkansas Permit Use of Voting Machines (1962). There have also been dozens of unsuccessful ballot initiatives that would have affected congressional elections. *See, e.g.*, California Rules for Absentee Voting, Proposition 14 (1914) (asking voters to adopt an absentee ballot system); North Dakota Abolish Absent Ballot Initiative (1936) (asking voters to abolish absentee voting); Alaska Runoff Voting Initiative, Measure 1 (2002) (asking voters to adopt a preferential voting system where each voter would rank their top five candidates). The frequent use of ballot initiatives to affect the "times, places, and manner" of congressional elections underscores the fact that the power initially vested in the states by the Elections Clause has always been understood to encompass direct legislative action by the electorate.

While Arizona was the first state to pass a ballot initiative affecting congressional redistricting, others have since joined it. *See, e.g.*, California Congressional Redistricting, Proposition 20 (2010) (granting the California Citizens Redistricting Commission jurisdiction to redistrict federal congressional lines); Florida Congressional District Boundaries, Amendment 6 (2010) (providing the legislature with criteria that it must follow when redistricting). For decades before Arizona's initiative, voters in other states, likewise, tried and failed to address congressional redistricting through ballot initiative. *See, e.g.*, Oklahoma Congressional Redistricting, State Question 357 (1956) (asking voters to approve a congressional redistricting map); Ohio Redistricting Commission, Issue 2 (1981) (asking voters to approve a redistricting commission); California Creation of a Districting Commission, Proposition 14 (1982) (asking voters approve of redistricting through commission or judges). In each instance, it was understood that the voters—in their capacity as legislators—had the power to enact these measures.

C. Congress did not limit the scope of initiative powers when it approved state constitutions

Likewise, Congress did not stand idly by as broad initiative powers were established to give the people a say in the rules for federal elections. Indeed, Congress actively encouraged or acquiesced in these developments. Between 1791 and 1959, Congress carefully considered and actively debated the addition of thirty-seven states. Likewise, after the Civil War, Congress weighed the readmission of the

eleven former Confederate states. Congress did not assent lightly. Rather, it frequently imposed restrictions on new states. Eric Biber, *The Price of Admission: Causes, Effects, and Patters of Conditions Imposed on States Entering the Union*, 46 Am. J. Legal Hist. 119, 120 (2004).

But Congress never required state constitutions to avoid direct democracy. In fact, Congress approved constitutions that incorporated far-reaching aspects of popular sovereignty.[14] In the early twentieth century, as states began to amend their Constitutions to grant legislative power to the people through initiatives, referenda, or both, territories seeking admission to the Union did the same. *See, e.g.*, *State-by-State List of Initiative and Referendum Provisions*, Initiative & Referendum Inst., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Jan. 22, 2015). Indeed, Oklahoma, Arizona, and New Mexico all enshrined the people's legislative power in the new state constitutions approved by Congress.

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[14] The constitutions of Missouri and Nebraska—states admitted within the context of heated debates on the republican nature of slavery and civil rights—had a right of revolution and a mandatory referendum on the incurrence of $50,000 of state debt, respectively. *Id.* at 141–43; Mo. Const. of 1820, art. XIII, § 2; Neb. Const. of 1866, art. II, § 32. Likewise, the Louisiana Constitution envisioned popular votes on whether to hold a new constitutional convention. La. Const. of 1812, art. VII, § 1. The Utah constitution required mandatory referenda on property tax increases and the incurrence of public debt over specified levels, and public votes on proposed amendments as well as the adoption of the Constitution itself. Utah Const. of 1895, art. XII, § 7, art. XIV, § 3, art. XXIII, § 1, and schedule, § 11.

(ii) those that distinguish between a state "Legislature" and other state personnel or entities;

(iii) those that confer quasi-legislative or non-legislative powers upon a "Legislature"; and

(iv) those, such as the Elections Clause and Presidential Electors Clause that confer legislative authority over certain subjects upon the "Legislature"

See Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause* (unpublished manuscript), *available at* http://ssrn.com/abstract=2515096 (forthcoming 109 NW. U. L. REV. ONLINE ___ (2014)).

The text, context, original understanding, and consistent history of interpretation of the first three types of references to the term "Legislature" demonstrate that it is best understood as referring to a state's general lawmaking body of elected representatives, rather than a broader "legislative power" or other entities upon which a state's constitution may attempt to confer a portion of that legislative power. *Cf. Hildebrant*, 241 U.S. at 568–69. This consistent pattern of usage provides valuable information about the term's intended meaning, creating a strong—and ultimately insurmountable—presumption that the Elections Clause employs it in the same fashion.

A. The Constitution's Descriptions of Legislatures

The Constitution's usage of the term "Legislature" in certain provisions reveals certain characteristics about it. For example, Article VI's Oath Clause requires that "Members of the several State Legislatures . . . be bound by Oath or Affirmation, to support th[e] Constitution." U.S. CONST. art. VI, cl. 3.[3] This provision contemplates that a state legislature will have "[m]embers." *Id.* And its requirement that those "[m]embers" pledge to uphold the federal Constitution is best understood as referring to individuals who belong to a particular lawmaking institution within a state, rather than "[m]embers" of some overarching "legislative power" that conceivably encompasses the entire public eligible to vote on ballot initiatives.

Similarly, Article I's Qualifications Clause provides that a person may vote for the U.S. House of Representatives if he possesses "the Qualifications requisite for Electors of the most numerous Branch

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[3] The Fourteenth Amendment contains similar references; Section 2 imposes penalties on a State that denies the right to vote in federal or state elections, including elections for "members of the Legislature." U.S. CONST. amend. XIV, § 2. Section 3 prohibits a person who, while "a member of any State legislature . . engaged in insurrection or rebellion" against the United States from serving as a federal official unless Congress removes the disability by a two-thirds vote. *Id.* amend. XIV, § 3.

of the State Legislature." *Id.* art. I, § 2, cl. 1.[4] This provision treats the "Legislature" as an entity that presumptively features multiple "[b]ranch[es]" and is comprised of elected representatives (i.e., members selected by "[e]lectors"). *Id.*

Article I's Senate Vacancies Clause (which has been superseded by the Seventeenth Amendment) likewise provides that, if a vacancy occurs in the U.S. Senate "during the Recess of the Legislature of any State," the state executive may make a temporary appointment "until the next Meeting of the Legislature." *Id.* art. I, § 3, cl. 2. Yet again, this provision contemplates the existence of an institutional legislature whose members periodically meet and which may be called into "[r]ecess." *Id.* Finally, the Domestic Violence Clause in Article IV provides that, "on Application of the [state] Legislature, or of the [state] Executive (when the Legislature cannot be convened)," the federal government shall protect a state against "domestic Violence." *Id.* art. IV, § 4. This further corroborates the constitutional image of a legislature as a multimember body that periodically "convene[s]" and adjourns. *Id.*

Thus, every clause that gives some insight into the nature of the "Legislature" uses the term to refer to a particular institution within each state that contains members, is presumptively comprised of multiple branches, periodically convenes and meets

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[4] The Seventeenth Amendment contains identical language concerning U.S. Senate elections. U.S. CONST. amend. XVII.

for limited periods of time, and then enters into recess.

B. Constitutional Provisions That Distinguish Between Legislatures and Other State Personnel and Entities

Several other constitutional provisions expressly distinguish between legislatures (and their members) and other state officials and entities. For example, as discussed above, the Oath Clause requires "Members of the several State Legislatures, and all executive and judicial Officers of the several States" to take an oath or affirmation to support the Constitution. U.S. CONST. art. VI, cl. 3.[5] Likewise, the Senate Vacancies Clause provides that, if a vacancy occurs while the "Legislature of any State" is in recess, "the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." *Id.* art. I, § 3, cl. 2. And the Domestic Violence Clause requires the federal government to protect a state "against domestic Violence" upon "Application of the Legislature, or of the Executive (when the Legislature cannot be convened)." *Id.* art. IV, § 4. These provisions all distinguish between the state legislature and the state executive (or state executive officials). This juxtaposition of different branches suggests that, just as references to a state's "Executive" are best construed as referring to its

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[5] Provisions of the Fourteenth Amendment discussed earlier reprise this list of State officials. *See supra* note 3.

governor, references to a state's "Legislature" are best construed as referring to its main lawmaking body comprised of elected representatives.

Even more telling is Article V, which specifies that a proposed constitutional amendment may be ratified either by "the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof," depending on the mode of ratification authorized by Congress. *Id.* art. V. This clause expressly distinguishes between legislatures and conventions specially elected by the people for the sole purpose of ratifying a constitutional amendment. *Id.* It demonstrates that, when the Framers wished to authorize action by the people independent of their institutional legislatures, they knew how to do so. Article V further bolsters the conclusion that the term "Legislature" refers to the particular institution within a state that exercises its general lawmaking authority, and does not extend to public referenda or initiatives.

C. References to Quasi-Legislative and Non-Legislative Powers

Numerous constitutional provisions confer authority on state legislatures other than the power to enact certain types of laws. The Constitution grants them the power to:

- choose U.S. Senators (since repealed by the Seventeenth Amendment), U.S. CONST. art. I, § 3, cl. 1;

- "fill" Senate vacancies, *id.* art. I, § 3, cl. 2; *cf. id.* amend. XVII, § 2;

- "call" for a convention for proposing amendments to the Constitution, *id.* art. V;

- "appl[y]" to the federal government for "protect[ion] against domestic Violence," *id.* art. IV, § 4;

- "ratif[y]" proposed amendments to the Constitution, *id.* art V; and

- "[c]onsent" to the formation of new states within their borders or through "Junction" with other states, *id.* art. IV. § 3, cl. 1, or to the federal government's purchase of, and exercise of exclusive authority over, land within the state for the erection of military facilities, docks, and other "needful Buildings," *id.* art. I, § 8, cl. 17.

These provisions specifically and exclusively empower institutional legislatures, rather than other entities or the public at large, to perform certain acts. For example, as originally enacted, the Constitution directed state legislatures, rather than the electorate, to choose U.S. senators. *Id.* art. I, § 3, cl. 1. During the Constitutional Convention, James Dickenson moved that senators be elected by state legislature for two reasons:

> 1. because the sense of the States would be better collected through their Governments; than immediately from the people at large.
> 2. because he wished the Senate to consist of the most distinguished characters and he thought such characters more likely to be selected by the State Legislatures, than in any other mode.

James Madison, *Notes on the Constitutional Convention* (June 7, 1787) (statement of John Dickinson), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 150 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]. He later added that empowering legislatures would help preserve the states as distinct entities and "produce that collision" between the federal and state governments "which should be wished for in order to check each other." 1 *id.* at 153 (statement of John Dickinson).

Throughout the ensuing debate, all delegates used the term "Legislature" consistently, referring to a particular, well-understood entity within each state.[6] Later in the convention, James Wilson reiterated:

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[6] For example, Roger Sherman urged that "elections by the people" are not as likely "to produce such fit men as elections by the State Legislatures." James Madison, *Notes on the Constitutional Convention* (June 7, 1787) (statement of Roger Sherman), *in* 1 FARRAND'S NOTES, *supra* at 154. Elbridge Gerry similarly contended that allowing the People to select Senators directly would give the "landed interest" an advantage and leave commercial interests with "no security." 1 *id.* at 152

> [O]ne branch of the Genl.—Govt. (the Senate or second branch) was to be appointed by the State Legislatures. The State Legislatures, therefore, by this participation in the Genl. Govt. would have an opportunity of defending their rights. The States having in general a similar interest, in case of any proposition in the National Legislature to encroach on the State Legislatures, he conceived a general alarm [would] take place in the National Legislature itself, that it would communicate itself to the State Legislatures, and [would] finally spread among the people at large.

James Madison, *Notes on the Constitutional Convention* (June 21, 1787) (statement of James Wilson), *in* 1 *id.* at 355-56. Thus, in commenting on the selection of Senators, Wilson expressly distinguished among a "State" as a whole, state legislatures, and "the people at large." 1 *id.* at 355-56 (statement of James Wilson).

Likewise, in discussing the Senate Vacancies Clause, the Framers' debates unmistakably concerned institutional legislatures: they discussed the relative frequency with which various states' legislatures met and the power of certain legislatures to select the state's governor. James

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(statement of Elbridge Gerry). Conferring that power on state legislatures, in contrast, would "be most likely to provide some check in favor of the commercial interest [against] the landed; without which oppression will take place." *Id.*

Madison, *Notes on the Constitutional Convention* (Aug. 9, 1787) (statement of James Wilson), *in* 2 *id.* at 231. The same is true of Article V's delegation of authority to state legislatures to call for a new constitutional convention and to ratify amendments to the Constitution. U.S. CONST. art. V. As this Court noted in *Hawke v. Smith*, 253 U.S. 350, 386 (1920), Article V does not use "a term of uncertain meaning . . . . What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." The debates at the Constitutional Convention also confirm that the power to request federal assistance under the Domestic Violence Clause lies specifically in the institutional legislature. *See* James Madison, *Notes on the Constitutional Convention* (Aug. 17, 1787; Aug. 30, 1787), *in* 2 FARRAND'S RECORDS, *supra* at 316-17, 466-47.

D. References to Legislative Authority

The plain text of the Constitution, context of other constitutional provisions, and Framers' original understanding all confirm that the Constitution's numerous other instances of the term "Legislature" uniformly refer to the specific institution within each state, comprised of elected representatives, that exercises general lawmaking authority. Compelling evidence is therefore necessary to conclude that the term has a different, unique, and unusual meaning as used in the

Elections Clause (or its counterpart, the Presidential Electors Clause).

This Court previously held that the term "Legislature" should be accorded a different meaning in the Elections Clause because that provision—unlike most of the Constitution's other references to legislatures—confers a type of traditionally legislative authority on state legislatures: the ability to enact laws regulating federal elections. *Smiley v. Holm*, 285 U.S. 355, 367 (1932) (holding that the language of the Elections Clause "aptly points to the making of laws"); *Bush v. Gore*, 531 U.S. 98, 123 n.1 (2000) (Stevens, J., dissenting). The Court never explained, however, why this somewhat different context requires a unique definition of "Legislature" that differs from its use throughout the rest of the Constitution.

In *Ohio* ex rel. *Davis v. Hildebrant*, 241 U.S. 565, 569 (1916), this Court held that the Election Clause permitted Congress to enact a law authorizing states to draw or alter congressional districts through either state legislation or public referendum. It rejected as "plainly without substance" a challenge to a public referendum that nullified a redistricting plan enacted by the Ohio legislature. *Id.* Despite the Court's single passing reference to the Elections Clause, however, it assumed that any constitutional challenge to the use of public referenda to enact state laws governing federal elections must arise under the Guarantee Clause. *Id.* (discussing U.S. CONST. art. IV, § 4).

According to the *Hildebrant* Court, the Petitioners were arguing that public referenda "introduce a virus" that "annihilates representative government and causes a State . to be not republican in form." *Id.* It summarily rejected that argument on the grounds that Guarantee Clause claims are non-justiciable. *Id.* Thus, while *Hildebrant* mentioned the Elections Clause, it neither held nor purported to explain why the electorate or a public referendum qualifies as a "Legislature" under the Elections Clause. Rather, the *Hildebrant* Court failed to recognize that a distinct Elections Clause claim existed, and instead transmuted the plaintiff's claim under that provision into a non-justiciable Guarantee Clause argument.

In *Hawke v. Smith*, 253 U.S. 221, 227 (1920), this Court held that the term "Legislature" in the Article V Amendment Clause exclusively refers to "the representative body which ma[kes] the laws of the people." The *Hawke* Court distinguished *Hildebrant*, contending that *Hildebrant* held the Elections Clause "plainly gives authority to the State to legislate" concerning federal elections through public referenda. *Id.* at 231. Congress therefore could recognize a "referendum as part of the legislative authority of the State" for purposes of federal constitutional provisions dealing with the ability of states to enact certain kinds of laws. *Id.* at 230. "Such legislative action," *Hawke* reasoned, "is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In

such expression no legislative action is authorized or required." *Id.* at 231.

Hawke's premise—that *Hildebrant* purported to interpret the Elections Clause—is an overstatement. As discussed above, *Hildebrant* misinterpreted or avoided the Elections Clause issue by transmuting it into a Guarantee Clause claim. In any event, *Hawke* never explained why the term "Legislature" should be given different meanings under the Elections Clause and Article V (or the other constitutional provisions *Hawke* surveyed). The Court pointed out that enacting statutes under the Elections Clause to regulate federal elections is a traditional legislative activity, while ratifying constitutional amendments under Article V is a quasi- or non-legislative act. *Id.* It never explains, however, why this change of context requires or justifies attributing a different and unusual meaning to the term "Legislature." In light of the Constitution's consistent use of that term throughout the rest of the document, there is a strong presumption that the Elections Clause uses it in the same manner—a presumption that neither *Hildebrant* nor *Hawke* overcomes.

The Court gestured toward these issues in *Smiley v. Holm*, 285 U.S. 355, 365-66 (1932), in which it held that the Elections Clause permits a state's governor to veto a law, enacted by the state's institutional legislature, regulating federal elections. *Smiley* reiterated the point made in *Hawke* that, unlike most other federal constitutional provisions referring to "legislatures," the Elections Clause grants them lawmaking authority. *Id.* at 367.

Smiley went on to hold, "As the authority is conferred for the purpose of making laws for the State, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments." *Id.* Smiley never held that the term "Legislature" should mean something other than a state's institutional, representative lawmaking body. Rather, it concluded only that when such an entity exercises authority under the Elections Clause, it must do so subject to the standard lawmaking process set forth in the state constitution, including a gubernatorial veto. *Id.* at 372-73.

Thus, the holdings of both *Hawke* and *Smiley* are consistent with an intratextual reading of the term "Legislature" as used in the Elections Clause, and *Hildebrant* does not actually address the issue. This Court never identified any evidence that the Framers intended to use the term differently in in the Elections Clause (or its counterpart, the Presidential Electors Clause) than throughout the rest of the Constitution. Nor did it provide a persuasive explanation as to why the word should mean something different when referring to the exercise of a traditionally legislative power rather than a quasi- or non-legislative power.

The *Federalist Papers* specifically confirm that the term "Legislature" bears the same meaning in the Elections Clause as it does in Article I, § 3, which permitted state legislatures to select U.S. senators. After recognizing that state legislatures might

attempt to undermine the national government by refusing to name senators, Federalist No. 59 declares that the federal government would "run a much greater risk" from legislatures' power under the Elections Clause to regulate House elections than from their power to appoint Senators. THE FEDERALIST NO. 59, at 302-03 (Alexander Hamilton) (Ian Shapiro ed., 2009). It goes on to discuss various reasons why state legislatures would be more likely to refrain from holding congressional elections than from appointing senators. *Id.* at 303-04. The Elections Clause alleviates this risk by permitting Congress to impose its own rules for congressional elections if states fail to act. *Id.* at 302.

The early *Commentaries* of both St. George Tucker and Chancellor Kent likewise discuss "Legislatures" under Article I, § 3 and under the Elections Clause—often in the same sentence—without suggesting any potential difference in the term's meaning. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, note D, pt. 2, at 143–44 (Philadelphia, William Young Birch, and Abraham Small 1803); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, pt. 2, lecture XI, at 210–12 (New York, O. Halsted 1826). Kent also distinguished between having the legislature select presidential electors and allowing the "people at large" do so, confirming that a power vested in a "legislature" may not be exercised directly by the

electorate as a whole (as through an initiative or referendum). KENT, *supra* pt. 2, lecture XIII, at 232.

The best reading of the word "Legislature" as it appears throughout the Constitution, including in the Elections Clause and Presidential Electors Clause, therefore, is that it refers solely and exclusively to a state's general lawmaking body comprised of elected representatives and cannot extend to other entities such as independent redistricting commissions.

II. AN ORIGINALIST INTERPRETATION OF THE TERM "LEGISLATURE" CONFIRMS THAT IT REFERS SOLELY TO A STATE'S PRIMARY ELECTED LAWMAKING BODY

An intratextual interpretation of the term "Legislature" is consistent with a clause-bound approach that focuses on how that term would have been generally understood in the Founding Era. Any such textual analysis must focus on dictionaries from that period. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014); *Heller*, 554 U.S. at 584. Matthew Hale's 1713 *The History of the Common Law of England* defines the British "Legislature" as comprised of three parts: the King of the Realm and the two Houses of Parliament. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 2 (London, J. Nutt 1713). Citing Hale's work, Samuel Johnson's mid-1700s dictionary defines "legislature" as "the power that makes laws." 2 SAMUEL JOHNSON,

A DICTIONARY OF THE ENGLISH LANGUAGE 32 (London, W. Strahan 1755). Several other dictionaries from the Founding period utilized Johnson's definition verbatim. *E.g.*, CALEB ALEXANDER, THE COLUMBIAN DICTIONARY OF THE ENGLISH LANGUAGE 285 (Boston, Isaiah Thomas & Ebenezer T. Andrews 1800); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 360 (London, Charles Dilly, 2d ed. 1789).

James Barclay's dictionary provides a definition of "legislature" similar to Johnson's but, akin to Hale, discusses it as being comprised of the House of Lords and the House of Commons. JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN XLI-XXII, 657 (London, Richardson & Urquhart 1774).

Entities such as the Arizona Independent Redistricting Commission would not qualify as "legislatures" under the prevailing definition from the Founding Era for at least three reasons. First, those definitions' use of the definite article "the" implies the existence of a single legislature within each sovereign entity. They appear to preclude the recognition of multiple entities within a state as state "legislatures." Second, the definition refers to the exercise of a general lawmaking power. An entity specifically empowered to enact only certain kinds of laws or perform only certain narrow types of functions (i.e., drawing congressional districts) would not qualify as a "legislature." Third, drawing congressional districts arguably does not even qualify as "mak[ing] laws."

Perhaps more importantly, every state constitution from the Founding Era that used the term "legislature" defined it as a distinct multimember entity comprised of representatives with the general authority to enact laws,[7] and most

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[7] DEL. CONST. of 1776, art. 2 ("The legislature shall be formed of two distinct branches; they shall meet once or oftener in every year, and shall be called, 'The general assembly of Delaware.'"); GA. CONST. of 1777, art. II ("The legislature of this State shall be composed of the representatives of the people . and the representatives shall be elected yearly . . "); MD. CONST. of 1776, art. I ("THAT the Legislature consist of two distinct branches, a Senate and House of Delegates, which shall be styled, The General Assembly of Maryland."); MASS. CONST. pt. II, ch. I, § 2, art. II; pt. II, ch. I, § 3, art. I ("The Senate shall be the first branch of the legislature There [also] shall be, in the legislature of this commonwealth, a representation of the people, annually elected . . . "); N.Y. CONST. of 1777, art. II ("[T]he supreme legislative power within this State shall be vested in two separate and distinct bodies of men who together shall form the legislature "); VA. CONST. of 1776, para. 2 ("The legislative shall be formed of two distinct branches, who, together, shall be a complete Legislature."); see also N.H. CONST. of 1776, ¶ 4 (discussing "both branches of the legislature"); N.J. CONST. of 1776, art. VI (establishing the Council as "a free and independent branch of the Legislature of this Colony"); N.C. CONST. of 1776, declaration XVIII ("[T]he people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances."); PA. CONST. of 1776, art. XVI ("[T]he people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances . "); S.C. CONST. of 1778, art. IX (providing that the "journal shall be laid before the legislature when required by either house"). The organic documents of Connecticut and

other references to "legislatures" throughout those documents are consistent with that understanding. If the Elections Clause (or Presidential Electors Clause) used the term "Legislature" in a broader capacity, it would apparently be the only provision in any organic documents from the Founding Era to do so—not a single precedent in any state constitution supports a more expansive interpretation.

The *Federalist Papers* and Justice Story's *Commentaries* on the Constitution reinforce this interpretation. Federalist No. 59 and Section 814 of Story's *Commentaries*, which focus specifically on the Elections Clause, contend that there "were only three ways" in which the power to regulate federal elections could have been allotted: "it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former." THE FEDERALIST NO. 59, at 301 (Alexander Hamilton) (Ian Shapiro ed., 2009); *accord* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 814, at 281 (Boston, Hilliard, Gray & Co. 1833). They explain that the Elections Clause embodies the final alternative. These passages' contrast of the "national legislature," which refers exclusively to Congress, with "state legislatures" strongly suggests that the latter refers to a state's analogue to Congress: its institutional legislature, comprised of elected representatives that exercises general lawmaking authority.

Rhode Island did not refer to a "legislature." CT. CHARTER of 1662; R.I. & PROVIDENCE PLANTATIONS CHARTER of 1663.

William Rawle's *A View of the Constitution* likewise states that the Elections Clause permits Congress to "make or alter" regulations governing federal elections, "except as to the place of choosing senators," in order to "guard against a refractory disposition, should it ever arise in the legislatures of the states," concerning the issue. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 42 (Philadelphia, H.C. Carey & I. Lea 1825). He explains that the Elections Clause's exception concerning the place of choosing senators "was proper, as congress ought not to have the power of convening the state legislature at any other than its usual place of meeting." *Id.* Thus, Rawle also treated the entity empowered to select Senators as the same one delegated sole constitutional authority to regulate federal elections (subject only to congressional override). These sources all confirm that the original understanding of the term "legislature" referred to a state's primary elected lawmaking body. There is little support for *Hildebrant*'s notion that the term was understood more broadly as encompassing the totality of a state's lawmaking authority.

III. THE "INDEPENDENT STATE LEGISLATURE" DOCTRINE FURTHER CONFIRMS THAT THE TERM "LEGISLATURE" EXCLUSIVELY MEANS A STATE'S PRIMARY ELECTED LAWMAKING BODY.

Finally, the "independent state legislature" doctrine, which has been embraced by this Court, state courts, and both houses of Congress, further confirms the accuracy of an intratextual interpretation of "Legislature." *See generally* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 198-204 (2014) (discussing the doctrine in detail). This doctrine arises from the premise that a state legislature's authority to regulate federal elections comes directly from the U.S. Constitution. *Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [federal] elections . only within the exclusive delegation of power under the Elections Clause."). Consequently, a state constitution may neither impose substantive limits on the scope of a legislature's authority to regulate the time, place, or manner of federal elections, nor strip the legislature of its prerogative to do so. Arizona's Independent Redistricting Commission flatly violates the "independent state legislature" doctrine because the state constitutional amendment that created it purports to strip the legislature, as a matter of state constitutional law, of authority it derives directly from the U.S. Constitution.

In 1892, this Court recognized the "independent state legislature" doctrine in *dicta* in *McPherson v. Blacker*, 146 U.S. 1 (1892). It stated that the Presidential Electors Clause "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" concerning presidential elections, including through "any provision in the state constitution in that regard." *Id.* at 25. This reasoning applies with equal force to congressional elections and the Elections Clause.

This Court went even further in *Leser v. Garnett*, 258 U.S. 130, 135 (1922), in which it held that the doctrine also applies to state legislatures' role in ratifying constitutional amendments under Article V. It ruled that a legislature's "function in ratifying a proposed amendment to the Federal Constitution is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." *Id.* at 137; *see also Nat'l Prohibition Cases*, 253 U.S. at 386 ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it."). Under the independent state legislature doctrine, a legislature's exercise of its authority under the U.S. Constitution to ratify certain federal constitutional amendments is valid, even though state constitutional provisions purported to prohibit the legislature from doing so. *Leser*, 258 U.S. at 136-37.

Several state courts have relied on the "independent state legislature" doctrine as an essential component of holdings concerning the Elections Clause and Presidential Electors Clause. For example, the Supreme Court of Rhode Island held in *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887), that the state constitution may not "impose a restraint upon the power of prescribing the manner of holding [federal] elections which is given to the legislature by the constitution of the United States without restraint." The court enforced a state law providing that a candidate had to receive only a plurality of votes in order to win a federal election, despite a state constitutional provision specifying that all candidates had to receive an absolute majority to prevail. *Id.*

Likewise, the Nebraska Supreme Court held that it was "unnecessary to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature" and a particular provision of the state constitution. *State* ex rel. *Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948). It explained that a state constitution may not "'circumscribe the legislative power' granted by the Constitution of the United States" to the legislature to regulate the selection of presidential electors. *Id.* (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)). Other courts have reached the same conclusion. *See, e.g.*, In re *Opinion of Justices*, 45 N.H. 595, 601 (1864) (holding that, because a State legislature's "authority to prescribe the time, place and

manner of holding elections for representatives in Congress" is derived from the Elections Clause, "[t]he constitution and laws of this State are entirely foreign to the question"); *see also Commonwealth* ex rel. *Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944). Modern courts also occasionally apply the "independent state legislature" doctrine. *See, e.g.*, *PG Publ'g Co. v. Aichele*, 902 F. Supp. 2d 724, 747–48 (W.D. Pa. 2012) (noting that the Pennsylvania legislature's authority to regulate the manner in which congressional and presidential elections are conducted stems from the U.S. Constitution and "is not circumscribed by the Pennsylvania Constitution").

The U.S. House of Representatives adopted the "independent state legislature" doctrine in resolving an election challenge in *Baldwin v. Trowbridge*, D.W. BARTLETT, DIGEST OF ELECTION CASES, H.R. MISC. DOC. NO. 41-152, at 46–47 (1870). The House upheld the validity of votes cast in a congressional election pursuant to a state law that authorized voting by military members who were absent from their districts on Election Day, despite a state constitutional provision requiring that all votes be cast in person. 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, § 856 (1907); *see also* In re *Holmes*, 1 *id.* at § 525 ("The constitution of a State may not control its legislature in fixing under the U.S. Constitution, the time of election for Congressmen.").

The U.S. Senate Committee on Privileges and Elections reached a similar conclusion in a report on the Electoral College. S. REP. NO. 43-395, at 9 (1874). It concluded that a state legislature's power under the Presidential Electors Clause to regulate presidential elections cannot be:

> taken from [state legislatures] or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the State constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

Id.

Numerous commentators have embraced the "independent state legislatures" doctrine. *See, e.g.*, Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 835 (2001) ("Suppose, then, that the state constitution forbade felons to vote. If the legislature, operating under the authority granted it by Article II rather than by the state constitution, decided that this limitation should not apply in voting for presidential electors, the legislative choice should prevail."); James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962) ("[S]tate legislatures are limited by constitutional provisions

for veto, referendum, and initiative in prescribing the manner of choosing presidential electors, but state constitutional provisions concerning suffrage qualifications and the manner of choosing electors do not limit the substantive terms of legislation."); Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737, 741 (1917) ("[T]he exercise of such power [to regulate presidential elections] is given to the state legislature subject to no restriction from the state constitution."). *But see* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 783–84 (2001) (arguing that the Founders did not construe the Presidential Electors Clause as authorizing state legislatures to act independently of state constitutions).

The "independent state legislature" doctrine's longstanding history and acceptance by this Court and state supreme courts, as well as both houses of Congress, confirm the validity of an intratextual interpretation of the Elections Clause. The "Legislature" is the state's general lawmaking body, and its powers under the Elections Clause may not be reduced or withdrawn by a state constitution. *See* Morley, *The Intratextual Independent "Legislature"*, *supra* at 21-23; *see also* Morley, *Rethinking the Right to Vote*, 67 VAND. L. REV. EN BANC at 198-204.

IV. THIS COURT SHOULD OVERTURN *OHIO* EX REL. *DAVIS v. HILDEBRANT.*

This Court could overturn the lower court's judgment, without revisiting any precedents, on the narrow grounds that the Elections Clause prohibits a State from completely excluding its legislature from the congressional redistricting process. Such a ruling, however, would both minimize the true meaning of the Elections Clause and overlook the other key constitutional defect with the IRC Amendment: the fact that it was enacted through an initiative process rather than by the legislature.

This Court has recognized that the Elections Clause confers upon state legislatures the power to "provide a complete code" for federal elections, including but not limited to laws concerning "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U.S. at 366. If this Court is persuaded that the term "legislature" refers exclusively to a state's general elected lawmaking body, *see supra* Parts I-III, then a state may not permit authority that the Constitution delegates specifically to that institutional legislature to be exercised independently of it, such as through an initiative or referendum process. This Court therefore should reject the propositions for which *Hildebrant* has come to be cited: that the term

"legislature" refers broadly to the totality of a state's "legislative power," regardless of how the state constitution chooses to allocate it, and that the Elections Clause therefore allows measures relating to congressional redistricting to be enacted through public referendum. *Hildebrant*, 241 U.S. at 569.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the U.S. District Court for the District of Arizona.

Respectfully submitted,

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DECEMBER 2014

AMICUS CURIAE BRIEF

No. 13-1314

IN THE

Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

On Appeal From The United States District Court For The District Of Arizona

BRIEF OF FORMER CALIFORNIA GOVERNORS GEORGE DEUKMEJIAN, PETE WILSON, AND ARNOLD SCHWARZENEGGER; CHARLES T. MUNGER, JR.; BILL MUNDELL; AND CALIFORNIA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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BRIEF OF FORMER CALIFORNIA GOVERNORS GEORGE DEUKMEJIAN, PETE WILSON, AND ARNOLD SCHWARZENEGGER; CHARLES T. MUNGER, JR.; BILL MUNDELL; AND CALIFORNIA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*[1]

This case concerns the constitutionality of the people of Arizona's decision to delegate to the Arizona Independent Redistricting Commission the authority to draw the State's congressional districts. *See* Ariz. Const. art. IV, pt. 2, § 1. As in Arizona, the people of California recently amended their state constitution to establish an independent commission to draw congressional districts. *See* Cal. Const. art. XXI, § 1 (providing that a "Citizens Redistricting Commission" "shall adjust the boundary lines of the congressional . . . districts"); *id.* § 2 (describing the Commission, its duties, and its membership); *id.* § 3 (addressing defense of districting map and proceedings challenging the final map). California's Citizens Redistricting Commission is the product of two ballot initiatives: Proposition 11, a 2008 measure that created the Commission to draw state legislative districts, and Proposition 20, a 2010 measure that ex-

[1] Pursuant to this Court's Rule 37.3(a), *amici* state that appellant and appellees have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

tended the Commission's authority to congressional redistricting. *See* Proposition—Districts—Voters First Act, 2008 Cal. Leg. Serv. Prop. 11 (West) ("Proposition 11"); Constitutional Amendments—Voters First Act, 2010 Cal. Leg. Serv. Prop. 20 (West) ("Proposition 20"). Those measures sought to ensure that the boundaries of California's congressional and legislative districts fairly represent the people of California, rather than protect incumbent politicians or a particular political party. *See* Proposition 11 § 2 (findings and purpose); Proposition 20 § 2 (same). The post-2010 round of redistricting in California was the first in which the Commission conducted the redistricting process.

Amici curiae George Deukmejian, Pete Wilson, and Arnold Schwarzenegger are former Governors of California. Each played a central role in efforts to reform the redistricting process in the State—which, as discussed below, has long been plagued by abuses, partisan and otherwise. Each former Governor, during his tenure in office, pursued reform measures—predecessors to the ultimately successful efforts in 2008 and 2010—that were designed to remove redistricting authority from the California Legislature and delegate it to an independent commission. Each former Governor supported Propositions 11 and 20.

Amicus curiae Charles T. Munger, Jr., is a longtime supporter of independent redistricting commissions. He was a principal advocate for Proposition 11, and was the "Yes on 11" campaign's largest financial backer. He was also a principal advocate for Proposition 20: he was closely involved in drafting Proposition 20; he was its official "proponent" responsible for submitting the measure to the California Attorney General, *see* Cal. Elec. Code § 342; and he was its largest financial supporter.

Amicus curiae Bill Mundell is also a longtime advocate of redistricting reform. He served as Chairman of Californians for Fair Redistricting, which qualified Proposition 77, a 2005 California initiative to adopt an independent redistricting commission. In 2010, he was executive producer of the documentary *Gerrymandering*, which was released nationally and played an integral role in the campaign for Proposition 20.

Amicus curiae California Chamber of Commerce ("CalChamber") is a nonprofit business association with more than 13,000 members, both individual and corporate, representing virtually every economic interest in the State. CalChamber acts on behalf of the business community to improve the State's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues and by participating as *amicus curiae* in cases, like this one, that have a significant impact on California businesses. CalChamber was one of the principal supporters of Propositions 11 and 20.

SUMMARY OF ARGUMENT

I. Under the Elections Clause and federal statute, the people of a State may—as the people of Arizona and California have done—authorize an independent commission to draw congressional districts.

A. The text, structure, and history of the Elections Clause make clear that a state legislature, or the people of a State exercising legislative power through the initiative process, may delegate authority to regulate congressional elections to another body duly created under state law. The people of a State therefore may use the initiative process to delegate to an independent redistricting commission their au-

thority under the Elections Clause to draw congressional districts.

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. In the Founding Era, the word "Legislature" referred to legislative power or authority, not to a particular legislative body or process. *See, e.g.*, Samuel Johnson, A Dictionary of the English Language 1188 (1755) ("legislature" means "[t]he power that makes laws"). The term "Legislature" thus unambiguously permits congressional redistricting to be undertaken by whatever lawmaking body the people of a State decide to vest with that power, including, for example, the State's elected legislature sitting in session or the people legislating through ballot initiative. And nothing in the Clause's permissive language prohibits that legislative body—whether the assembled legislators or the people themselves—from delegating its redistricting authority to an independent commission established in accordance with applicable state law.

The structure and history of the Clause confirm that conclusion. The first part of the Clause provides broad authority to States "to provide a complete code for congressional elections," *Smiley v. Holm*, 285 U.S. 355, 366 (1932), without restricting the type of state legislative body that can promulgate that "code." The second part of the Clause likewise imposes no limit on how each State decides to structure and assign its legislative power over congressional elections, so long as Congress has not "ma[de] or alter[ed]" the State's regulations. Moreover, at the

time of the ratification, it was widely understood that the Elections Clause confers sweeping authority on States to regulate congressional elections and that, although Congress possesses ultimate authority over those elections, the Clause itself does not limit the regulations that a State can prescribe or the legislative means by which a State can issue those measures. The check on the States' power over congressional elections rests in Congress, not the Elections Clause.

More broadly, the historical record confirms that the Framers would not conceivably have intended the Clause to restrict the legislative means through which the States regulate congressional elections. Debates over the Guarantee Clause, U.S. Const. art. IV, § 4, make clear that, while the States would be guaranteed a baseline republican form of government, each State would be free to experiment with how to arrange that government. This approach was sensible given that, in the years leading up to the ratification, the States were experimenting with varied forms of republican government; the historical record reflects that the Framers intended to preserve the States' leeway to structure their own governments, subject only to broad constitutional constraints. In addition, the Framers were concerned that state legislators would at times serve their own interests at the people's expense. Given that concern, it would make little sense to construe the Elections Clause to deprive the people of their legislative authority under state law to remove the redistricting power from state legislators and delegate it to an independent commission.

B. Congress has eliminated any conceivable doubt on this issue. Exercising its power to "make or alter . . . Regulations" for congressional elections,

U.S. Const. art. I, § 4, cl. 1, Congress has established that "a State" may be "redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c). The history behind that provision confirms that it was worded expressly to permit States to adopt congressional districts under whatever legislative procedure state law provides—whether through independent commissions exercising delegated legislative authority, the votes of the State's elected legislative officials, or the people drawing electoral lines through the initiative process.

II. California's redistricting history confirms the wisdom of the approach that the Framers enshrined in the Elections Clause and that Congress confirmed in 2 U.S.C. § 2a(c). For decades, the California Legislature abused its power to adopt congressional districts, at times adopting highly partisan gerrymandered districts that sparked costly political battles and largely fruitless intervention by the courts, and at other times adopting bipartisan "sweetheart" gerrymanders designed to insulate incumbents of both major parties from electoral competition. The Framers recognized that adopting congressional districts was politically contentious, and they accordingly left the people of the States ample discretion to remedy any abuse by whatever legislative means state law provided. That flexible framework plainly—and wisely—permitted the people of California and Arizona, as the ultimate repositories of legislative power in those States, to use the initiative process to revoke their delegation of redistricting authority to the state legislature and instead delegate that power to an independent redistricting commission.

ARGUMENT

I. UNDER THE ELECTIONS CLAUSE AND FEDERAL STATUTE, THE PEOPLE OF A STATE MAY DELEGATE REDISTRICTING AUTHORITY TO AN INDEPENDENT COMMISSION.

The text, structure, and history of the Elections Clause make clear that a state legislature, or the people of a State exercising legislative powers through the initiative process, may delegate regulatory authority over congressional elections to another decision-making body duly created under state law. The people of a State can therefore use the initiative process to delegate redistricting authority to an independent redistricting commission. Moreover, to the extent that the Clause leaves any doubt on this issue, Congress has exercised its power under the Elections Clause to authorize the use of redistricting commissions to draw congressional districts.

A. The Elections Clause's Text, Structure, And History Make Clear That The People Of A State May Delegate Redistricting Authority To An Independent Commission.

1. *Text.* The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. The first part of the Clause unambiguously permits the body that exercises legislative power within each State—whether elected officials, the people themselves, or some combination of the two—to decide whether to retain the

redistricting power for itself or delegate it to some other decision-maker in accordance with state law.

In the Founding Era, the term "Legislature" referred broadly to legislative power or authority; it did not refer only to a particular legislative body or process. Samuel Johnson defined "legislature" simply as "[t]he power that makes laws." Samuel Johnson, A Dictionary of the English Language 1188 (1755); Samuel Johnson, A Dictionary of the English Language (1785) (same); Samuel Johnson, A Dictionary of the English Language (1802) (same). Thomas Sheridan's dictionary defined "legislature" exactly as Dr. Johnson did: "The power that makes laws." Thomas Sheridan, A Complete Dictionary of the English Language (4th ed. 1797). Noah Webster defined the term precisely that way as well. *See* Noah Webster, Compendious Dictionary of the English Language (1806). And Nathan Bailey similarly defined "legislature" as "the Authority of making laws, or Power which makes them." N. Bailey, An Universal Etymological Dictionary (20th ed. 1763). None of these authorities confined the term "legislature" to a particular body.

Under the ordinary meaning of "Legislature" at the time of the ratification, then, the Elections Clause permits regulations for congressional elections to "be prescribed in each State by" (U.S. Const. art. I, § 4, cl. 1) whatever body exercises "[t]he power that makes laws" (Johnson, *supra*, at 1188 (1755); Sheridan, *supra*; Webster, *supra*) or "the Authority of making laws" (Bailey, *supra*) in that State. The Clause thus permits the people of Arizona and California—who are the ultimate repositories of legislative authority in each State—to use the initiative process to make redistricting decisions. *See* Ariz. Const. art. IV, pt. 1, § 1(1) ("The legislative authority

of the state shall be vested in the legislature, . . . but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature . ."); Cal. Const. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.").

The Clause further permits the people to decide by ballot initiative to delegate their legislative authority over redistricting to an independent commission duly established under state law. Nothing in the language of the Elections Clause suggests that the people are barred from delegating that legislative power to a decision-maker of their choosing. Indeed, it is well-settled that the federal judiciary lacks the authority to superintend the decisions of state legislative bodies to delegate a portion of their authority to another decision-maker. Those matters of internal state governance are outside the purview of this Court. *Cf. Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cnty.*, 281 U.S. 74, 79-80 (1930) ("As to the guaranty to every state of a republican form of government (sec. 4, art. IV), it is well settled that the questions arising under it are political, not judicial, in character, and thus are for the consideration of the Congress and not the courts."); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912).[2]

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[2] At the federal level, it is likewise clear that Congress can delegate its legislative power to other governmental actors as long as it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to

2. ***Structure.*** The Elections Clause as a whole confirms that the Framers used the term "Legislature" in the Clause to denote legislative *power*—not a particular legislative *body*—and that, in keeping with the ordinary meaning of that term at the ratification, the Clause does not specify a particular legislative body in which a State must vest that power or restrict the right of that body to delegate its power to another decision-maker.

As addressed above, the first part of the Elections Clause authorizes the "Legislature" of "each State" to "prescrib[e]" "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. The "substantive scope" of this part of the Clause "is broad." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013). "Times, Places and Manner" are, this Court has emphasized, "comprehensive words" that "embrace authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). The first part of the Clause does not impose any restrictions on the process or means by which a State's "Legislature"—its lawmaking power, *see supra* at 7-9—may promulgate that "code."

The second part of the Elections Clause reinforces that conclusion. That part authorizes Congress, "by Law," to "make" "Regulations" for elections or "alter" the "Regulations" prescribed by each State's

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[Footnote continued from previous page]

conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). It is inconceivable that the Framers would have placed greater restraints on the authority of the legislators and people of the sovereign States to delegate their legislative powers than on the authority of Congress to do so.

legislature, "except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. That language carves out for Congress ultimate authority over the way in which congressional elections are regulated, but it does not limit how each State's "Legislature" may exercise its power when Congress has not "ma[de] or alter[ed]" the State's regulations. As the Framers structured the Elections Clause, Congress could conceivably never act under the second part of the Clause at all: it *could* "make or alter" regulations over elections, but it need not do so. This structural feature underscores that the Clause necessarily grants state legislative bodies extensive leeway when regulating congressional elections—including, in the absence of congressional override, the unrestricted right to delegate that authority to another decisionmaker, such as an independent redistricting commission. This structure confirms, moreover, that if such commissions were problematic, the Framers understood that any remedy rested with Congress.

3. ***Debates over the Elections Clause.*** The historical record regarding the Elections Clause confirms that the Clause does not limit the legislative means by which congressional districts may be drawn, and that the Clause accordingly permits the people of a State to delegate that power to an independent commission. Four features of the historical record reinforce this conclusion.

First, at the time of the ratification, the Elections Clause was understood to address primarily the division of federal and state power to regulate congressional elections—not the legislative process by which each State could exercise the power granted to it. Alexander Hamilton explained that the Clause reflected the Framers' choice between lodging "power over elections" "wholly in the national legislature, or

wholly in the State legislatures, or primarily in the latter and ultimately in the former." The Federalist No. 59, at 360 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (1961). Hamilton did not suggest that the Clause embodied limitations on how States could exercise the power they were granted (aside from Congress's ultimate power over federal elections). Similarly, James Madison observed that, by including a congressional power to override state regulations, the Elections Clause was meant to prevent state legislatures from having an "uncontrouled right" over congressional elections. 2 The Records of the Federal Convention of 1787, at 240 (Max Farrand ed. 1911) ("Farrand"). Like Hamilton, Madison did not suggest that the Clause included other, unexpressed restrictions on state power—such as a restriction on the decision-makers to whom a state legislative body could delegate its authority to regulate the time, place, and manner of holding congressional elections. Given the concerns of the Anti-Federalists regarding potential encroachments on state power, any such federally imposed restrictions on the right of States to structure their own governments would have been met with the most vociferous opposition—but the historical record is devoid of any such evidence.

Second, the Elections Clause was widely understood to confer sweeping power on the States—even the power to regulate elections in ways that presented an obstacle to a well-functioning federal government or were otherwise improper. That broad understanding of state power is incompatible with the cramped view that the Clause bars the people of a State from delegating redistricting authority to an independent commission.

The ratification debates over the Elections Clause focused almost exclusively on the second part of the Clause, and in particular on whether Congress should have authority to preempt state election regulations. Anti-Federalists contended that such a power would enable Congress to swallow state authority and regulate elections in a way that benefited the powerful. Expressing these concerns, the Anti-Federalist Brutus argued that, "under [the Elections Clause], the foederal legislature may institute such rules respecting elections as to lead to the choice of one description of men." Brutus, Letter IV, N.Y. J., Nov. 29, 1787, *reprinted in* 14 The Documentary History of the Ratification of the Constitution 297, 301 (John P. Kaminski et al. eds. 1983) ("Documentary History").

The Constitution's supporters responded to such concerns by emphasizing that States could abuse the power conferred on them by the Elections Clause and that a congressional override was needed to address such abuse. They recognized that, while the people were likely to be attached to the new federal government, members of existing state governments stood to lose power under a strong central government and might seek to use their Elections Clause power to frustrate the success of that government. *See, e.g.*, 1 Farrand 132-33 (James Wilson: "The opposition [to the new national government] was to be expected . . . from the *Governments*, not from the Citizens of the State. . . The State officers were to be the losers of power.").

For example, at the federal convention, opposing a motion to strike the second part of the Clause, James Madison explained that "[t]he necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common in-

terest at the expense of their local conveniency or prejudices." 2 Farrand 240. "[T]he Legislatures of the States," he argued, thus "ought not to have the uncontrouled right of regulating the times places & manner of holding elections." *Id.* Explaining the need for a congressional check on state legislative power, Madison emphasized that the first part of the Clause uses "words of great latitude." *Id.* A congressional check on the broad power granted by those words was needed, he continued, because "[i]t was impossible to foresee all the abuses that might be made of the discretionary power" given to the States:

> Whether the electors should vote by ballot or viv[a] voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures[,] and might materially affect the appointments. . . . What danger could there be in giving a controuling power to the Natl. Legislature?

Id. at 240-41. Madison thus recognized that the Clause conferred sweeping "discretionary power" on the States—power that the States could use "abus[ively]" in ways that could not be "foresee[n]"—which necessitated a congressional backstop. *Id.* at 240. Such a capacious grant of power, though dangerous, was necessary because, as Madison explained at the Virginia ratifying convention, "[i]t was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 367 (Jonathan Elliot ed., 2d ed. 1891) ("Elliot").

Indeed, the Framers widely understood that the States would possess far-reaching power under the first part of the Elections Clause. The Clause's supporters regularly emphasized, like Madison, that the second part of the Clause was necessary because the States could exercise their broad authority improperly. Many supporters argued, for example, that the second part of the Clause was needed so that Congress could ensure its own existence: If Congress lacked authority to regulate federal elections, States could cripple the House of Representatives by refusing to provide for congressional elections. As Alexander Hamilton put it, giving States "exclusive power of regulating elections for the national government" could "accomplish the destruction of the Union." The Federalist No. 59, at 364. In defending the need for a congressional override, Hamilton accordingly emphasized that "every government ought to contain in itself the means of its own preservation." *Id.* at 360 (emphasis omitted); *see also Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2253 (affirming this purpose). The Constitution's other supporters echoed him. *See, e.g.*, 3 Elliot 367 (James Madison, at Virginia ratifying convention: "Were [election regulations] exclusively under the control of state governments, the general government might easily be dissolved."); 2 Elliot 440 (James Wilson, at Pennsylvania ratifying convention: the Elections Clause was "necessary" to (among other things) give "the federal government" "self-preserving power").

Other defenses of Congress's "make or alter" authority similarly emphasized the need to address potential abuse by the States of their authority to regulate federal elections—a concern that arose precisely because the Clause conferred such sweeping power on the States. The Elections Clause's supporters

emphasized that Congress needed to be able to remedy such abuses, as when a State:

- drew congressional districts unfairly, *see*, *e.g.*, 2 Elliot 27 (Theophilus Parsons, at Massachusetts ratifying convention: a congressional override was needed if state legislatures were to "make an unequal and partial division" of congressional districts);
- provided that an election be held in a single location or in locations inconvenient for many, *see*, *e.g.*, 2 Elliot 441 (James Wilson at Pennsylvania ratifying convention) (noting that an election might be held in "Pittsburgh"));
- imposed *viva voce* voting, *see*, *e.g.*, 2 Documentary History 413 (Thomas McKean, at Pennsylvania ratifying convention: "If, for instance, the states should direct the suffrage of their citizens to be delivered *viva voce*, is it not necessary that the Congress should be authorized to change that mode, so injurious to the freedom of election, into the mode by ballot, so happily calculated to preserve the suffrages of the citizens from bias and influence?");
- adopted election rules that would enable state legislatures to control the House of Representatives, *see*, *e.g.*, 2 Elliot 441 (Francis Cabot at the Massachusetts ratifying convention: "if the state legislatures are suffered to regulate conclusively the elections of the democratic branch, they may, by such an interference, . . . at first diminish, and finally annihilate, that control of the general government, which the people ought always to have through their immediate representatives"); or

- otherwise acted arbitrarily, *see, e.g.*, 2 Elliot 27 (Theophilus Parsons, at Massachusetts ratifying convention: a congressional override was needed if, for example, a state legislature were to arbitrarily "disqualify one third of the electors").

The understanding underpinning all of these accounts is that the first part of the Elections Clause grants to state legislatures comprehensive authority to regulate elections—even in ways that are arguably unfair, arbitrary, or improper. Congress, the Clause's supporters made clear, needed to be able to remedy such misuses of the power granted to the States by the Clause. Given the breadth of that power—which encompassed the authority even to enact unjust and unreasonable election regulations—it is implausible that the Clause would simultaneously bar States from using independent redistricting commissions to adopt fair, representative congressional districts. In any event, if the use of such commissions were somehow problematic, the Framers understood that the remedy rested with Congress—through its "make or alter" power—not with the federal courts. *Cf. Hildebrant*, 241 U.S. at 569.

Third, while the Framers considered Congress's "make or alter" power to be an essential backstop, they understood the Elections Clause to leave the regulation of congressional elections substantially to the States in the first instance. More specifically, although they granted Congress plenary authority over congressional elections, the Framers believed that, as a prudential matter, Congress should invoke that authority to reject state regulations only in rare circumstances. At the Virginia ratifying convention, for example, James Madison maintained: "[I]f [elections] be regulated properly by the state legislatures,

the congressional control will very probably never be exercised." 3 Elliot 367. This was proper because "the state governments" are "best acquainted with the situation of the people." *Id.*

Supporters of the Elections Clause emphasized, moreover, that, despite possessing ultimate authority over congressional elections, Congress would likely override state regulations *only* in cases of necessity or abuse. At the Pennsylvania ratifying convention, Jasper Yeates argued that the power to preempt the States' election regulations would be invoked only "in a case of necessity, after the factious or listless disposition of a particular state has rendered an interference essential to the salvation of the general government." 2 Documentary History 437. Alexander Contee Hanson proclaimed it difficult to "imagine" "that congress will presume to use this power, without the occurrence of some one or more of" various extreme "cases": "the cases of invasion by a foreign power; of neglect, or obstinate refusal, in a state legislature; of the prevalence of a party, prescribing so as to suit a sinister purpose, or injure the general government." Aristides (Alexander Contee Hanson), Remarks on the Proposed Plan, Jan. 31, 1788, *reprinted in* 15 Documentary History 522, 526. At the North Carolina ratifying convention, future Supreme Court Justice James Iredell likewise explained: "An occasion may arise when the exercise of this ultimate power in Congress may be necessary," but such an occasion would be rare—"as, for instance, if a state should be involved in war, and its legislature could not assemble." 4 Elliot 53. The historical record does not suggest that the decision by a state legislature, or the people of a State, to delegate its authority under the Elections Clause to another decision-maker is one of the rare circumstances that

would warrant correction by Congress—let alone invalidation by a court.

Fourth, the historical record demonstrates that the Elections Clause was intended to protect the right of suffrage and to promote fair elections—the same objectives that animated the decisions of the people of Arizona and California to delegate redistricting authority under the Clause to an independent commission. At the Virginia ratifying convention, James Madison justified the congressional override as necessary "[s]hould the people of any state by any means be deprived of the right of suffrage." 3 Elliot 367. At the Massachusetts ratifying convention, Theophilus Parsons emphasized the need for a remedy if "a state legislature" were to "make an unequal and partial division of the states into districts for the election of representatives" (or do something else improper—such as "disqualify one third of the electors"). 2 Elliot 27. Parsons accordingly defended the second part of the Clause by explaining that it "provides a remedy" to "preserve and restore to the people their equal and sacred rights of election." *Id.* And at the Pennsylvania ratifying convention, Thomas McKean emphasized the need for Congress "to be enabled to make the necessary reform" if a State were to establish a "time and manner" of holding election that was "inconsistent with the principles of a pure and constitutional election." 2 Documentary History 413. It would be incongruous to construe the Elections Clause to prohibit the use of independent redistricting commissions established to serve the very goals that the Clause itself was meant to achieve.

4. ***Broader Historical Context.*** The broader Founding Era context confirms that the Framers did not intend the Elections Clause to restrict how the

people of a State could exercise the legislative power to regulate congressional elections or apportion governmental power within their own state governments to protect their interests more effectively.

For example, the debates concerning the Constitution's Guarantee Clause underscore the Framers' intention to leave the States with substantial leeway over the structure of their own governments. The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union, a Republican Form of Government." U.S. Const. art. IV, § 4. In an initial draft, however, the Clause provided: "That a Republican Constitution & *its existing laws* ought to be guaranteid to each State by the U. States." 2 Farrand 47 (emphasis added). Delegates to the federal convention objected to that language on the ground that the structures of government in some States were undesirable and that the States should be able to modify them. *See id.* (Gouverneur Morris objecting to preserving Rhode Island's existing laws); *id.* at 48 (William Houston "was afraid of perpetuating the existing Constitutions of the States," and noted that the constitution of Georgia "was a very bad one" that "he hoped would be revised & amended"). In the face of such objections, the Clause was amended to read substantially as it does today. *See id.* at 48-49.

In keeping with this desire for flexibility, James Madison explained that, although a federal government "founded on republican principles" "ought clearly to possess authority to defend the system against aristocratic or monarchial innovations," "th[at] authority" should "exten[d] no further than to a *guaranty* of a republican form of government." The Federalist No. 43, at 271-72 (James Madison). Beyond that baseline, he believed that the States

should have significant leeway in how they structure their governments: "Whenever the States may choose to substitute other republican forms [for those they have now], they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance." *Id.* at 272. Given the structural freedom that the Framers afforded the States, it is implausible that they would have intended the Elections Clause to bar the people from experimenting with different legislative means of exercising the redistricting power.

That organizational flexibility is consistent with, and an outgrowth of, the States' widespread experimentation with different governmental structures in the years preceding the ratification. In the 1770s, most of the States adopted new constitutions.[3] These constitutions varied significantly, including in the manner in which they allocated the various powers of government. Pennsylvania's 1776 constitution, for example, adopted a unicameral legislature and a multi-member executive with no veto power. *See* Pa. Const. of 1776. Massachusetts adopted a model more akin to the federal constitution, including a bicameral legislature and a single governor with veto power. *See* Mass. Const. of 1780, *available at* http://press-pubs.uchicago.edu/founders/print_documents/v1ch1s6.html (last visited Jan. 21, 2015). New York subjected its legislature's proposed laws to a council of

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[3] The text of most of these constitutions is available at http://avalon.law.yale.edu/subject_menus/18th.asp (last visited Jan. 21, 2015). Except as otherwise indicated, citations to those constitutions are to the versions reflected on that website.

revision, made up of the governor, chancellor, and judges, with the power to veto laws that violated the constitution. *See* N.Y. Const. of 1777. Other States adopted still other structures. In a time of such experimentation, if the Framers had intended the Elections Clause to restrict the people's right to organize their States' legislative authority as they saw fit, one would expect that intention to have been clearly expressed and widely debated. It was not.

Finally, by vesting in the people, rather than the state legislatures, the power to elect members of the House of Representatives, the Framers manifested their mistrust of state legislative bodies—a mistrust that is incompatible with construing the Elections Clause to empower elected state legislatures alone to exercise redistricting authority. At the federal convention, the Framers considered proposals that the House be elected by the state legislatures, rather than by the people directly. *See* 1 Farrand 48-50, 132-38, 358-60. In defending direct elections by the people, James Wilson argued that "[t]he [national] Legislature ought to be the most exact transcript of the whole Society," *id.* at 132, and that the people's interests would not be adequately served if the state legislatures were responsible for choosing representatives because "the Legislatures are actuated not merely by the sentiment of the people, but have an official sentiment opposed to that of the Genl[.] Govt. and perhaps to that of the people themselves," *id.* at 359. Rufus King similarly argued that "the [state] Legislatures wd. constantly choose men subservient to their own views as contrasted to the general interest." *Id.* Given the strongly articulated fears that state legislators would at times misuse their power—and the understanding that, with respect to state election regulations in particular, Congress would

override state legislatures only rarely, *see supra* at 17-19—the Framers would not conceivably have intended to preclude the people of a State from reforming their state government to protect their electoral rights, such as by creating independent redistricting commissions not controlled by self-interested state legislators.

B. Congress Has Confirmed In 2 U.S.C. § 2a That States May Adopt Congressional Districts Through Independent Redistricting Commissions.

As discussed above, the second part of the Elections Clause provides that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Even if the first part of the Elections Clause did not permit the people of a State to establish an independent commission to draw congressional districts, Congress has exercised its authority under the second part of the Clause to authorize States to do so. Specifically, Congress has recognized that "a State" may be "redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c). On its face, that language plainly authorizes the people of a State to use the initiative process to delegate a portion of their legislative authority to an independent redistricting commission duly established under state law. Moreover, the history behind that language confirms that it grants each State wide discretion to design its procedures for redrawing congressional districts.

Before 1911, federal apportionment law required that congressional district lines be maintained in place "until the legislature of such State in the man-

ner herein prescribed shall redistrict such state." Act of Feb. 7, 1891, ch. 116 § 4, 26 Stat. 735, 736; *see also Hildebrant*, 241 U.S. at 568. That changed in 1911, when Congress adopted language providing instead "that the redistricting should be made by a State 'in the manner provided by the laws thereof.'" 241 U.S. at 568 (quoting Act of Aug. 8, 1911, ch. 5 § 4, 37 Stat. 13, 14). The Act's history makes clear that this broader language was adopted specifically to embrace the initiative and referendum power. *See id.* at 568-69.

When the Senate considered the legislation that would eventually become the 1911 Act, the bill retained language providing that redistricting could be accomplished by "the legislature of" each State. *See* 47 Cong. Rec. S3436 (Aug. 1, 1911) ("by the legislature thereof"). In the view of Senator Theodore Burton, that language was "a distinct and unequivocal condemnation of any legislation by referendum or by initiative" and a message to each State that, "[w]hatever your laws may be for the enactment of statutes, yet in the division of the State into congressional districts you must act by the legislature alone." *Id.* "A due respect to the rights, to the established methods, and to the laws of the respective States," Senator Burton urged, "requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Id.* Senator Burton emphasized, moreover, that it made especially little sense to confine redistricting decisions to the elected legislature. "If there is any case in the whole list of laws where you should apply your referendum," he explained, "it is to a districting bill": such laws provide "opportunity for monstrous injustice," which is pre-

cisely what the referendum process is designed to address. *Id.* at S3437.

Given those considerations, Senator Burton proposed "strik[ing] out the words 'by the legislature thereof in the manner herein prescribed,'" and replacing them with "the words 'in the manner provided by the laws thereof.'" 47 Cong. Rec. S3437. That change, he explained, "gives to each State full authority to employ in the creation of congressional districts its own laws and regulations." *Id.* The law passed with that amendment, and, five years later, this Court recognized that "the legislative history of" the 1911 Act "leaves no room for doubt" that the amendment was made "for the express purpose, in so far as Congress had power to do it, of excluding the possibility" that a State could not use the referendum process to adopt congressional districts. *Hildebrant*, 241 U.S. at 568-69.

In 2 U.S.C. § 2a(c), Congress re-incorporated the operative language from the 1911 Act that Senator Burton had proposed for the purpose of authorizing redistricting in accordance with the laws of each State: "Until a State is redistricted *in the manner provided by the law thereof* after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner . . ." 2 U.S.C. § 2a(c) (emphasis added). In light of this Court's construction of that language in *Hildebrant*, there is an overwhelming presumption that Congress intended, by re-enacting the same language, to authorize States to draw congressional districts through the processes authorized by the laws of each State—including the initiative and referendum process. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Thus, to the extent there is any ambiguity regarding Arizona's authority under the Elections Clause, Congress's recognition that "a State" may be "redistricted in the manner provided by the law thereof" is dispositive in this case. The people of Arizona, acting through the legislative authority they reserved to themselves, passed an initiative delegating the redistricting power to an independent commission. That use of the initiative process to delegate redistricting power to a body duly created under state law falls squarely within the authorization provided by Congress in 2 U.S.C. § 2a(c).

II. California's Redistricting History Underscores The Wisdom Of The Approach Enshrined In The Elections Clause And Confirmed By 2 U.S.C. § 2a.

Redistricting presents States with difficult, politically fraught problems—most notably, gerrymandering and similar efforts to empower some groups at others' expense. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 326 (Stevens, J., dissenting). These problems are difficult to resolve either politically (because, with redistricting abuse, the legislative body is typically itself the source of the problem) or judicially (because manageable judicial standards are often elusive in the redistricting context). California's history with redistricting starkly illustrates the nature and extent of these problems. That history includes efforts to concentrate power in politically influential parts of the State and long-running campaigns by political majorities to promote and protect their electoral fortunes. As in Arizona, the people of California invoked the initiative process to ameliorate these problems by delegating redistricting authority to an independent commission. That effort—and the redis-

tricting abuses it was intended to remedy—confirms the wisdom of the Framers' decision in the Elections Clause and Congress's decision in 2 U.S.C. § 2a(c) to provide each State with the flexibility to craft its own redistricting procedures.[4]

A. The abuse of the redistricting process in California dates back to the State's admission to the Union in 1850. Attempts to restrain that abuse stretch back nearly as long.

1850-1941. In the first century of statehood, northern California counties sought to prevent their legislative power from eroding as southern California's population surged. The result was a series of agreements each decade that locked in existing power structures to the extent possible. In 1926, the people of California approved a proposal that created a "federal"-style state senate based upon area rather than population, which enabled counties suffering population losses to maintain their influence in one house of the legislature. This eventually led to severely unequal senate districts: by 1960, Los Angeles County's population exceeded six million yet the county had only one state senator, while a northern California district with a population of less than 15,000 (spread across three counties) also had one senator. *See* T. Anthony Quinn, *California*, *in* Reapportionment Politics: The History of Redistricting in the 50 States 53, 53 (Leroy Hardy et al. eds., The Rose Institute of State and Local Government 1981) ("Quinn"). Voters responded to such vast and growing disparities by qualifying four initiatives—in

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[4] It is a well-established principle of California law that the legislature in Sacramento and the people are co-equal "legislative bodies." *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 1002 (Cal. 1999).

1928, 1948, 1960, and 1962—that sought to return to a population-based reapportionment system. *See id.* Each measure failed. *See id.*

1951. The population imbalances generated by the "federal" senate were ultimately resolved by this Court's "one person, one vote" ruling in *Reynolds v. Sims*, 377 U.S. 533 (1964). *See* Quinn 55. By then, however, a new era of partisan gerrymandering had taken hold in California. An influx of Democratic voters in the 1940s made the Republicans' longstanding hold on the state legislature increasingly tenuous. *See id.* at 54. Republicans responded by drawing districts to lock in their partisan advantage. *See id.* That gerrymander lacked the technical sophistication of contemporary redistricting efforts, however, and it ultimately failed: Republicans drew too many marginally Republican seats at which Democrats could take aim, and in 1958 the Democrats took control of both houses of the legislature in a landslide. *See id.*

1961. The Democratic majority took revenge in the 1961 redistricting, eliminating weak Republican seats statewide. *See* Quinn 54-55. In 1964, the opportunity arose to do even more damage to Republicans when this Court's decision in *Reynolds* invalidated the "federal" approach to state senate apportionment. Democrats took the opportunity to gerrymander new state senate districts as they had done with congressional and assembly seats several years earlier. *See id.* at 55.

1971. The 1971 redistricting pitted a Democratic legislature against Republican Governor Ronald Reagan. *See* Quinn 55. A series of acrimonious negotiations produced a stalemate. *See id.* Democrats repeatedly forced gerrymanders through the legisla-

ture, only to have them vetoed. *See id.* As the 1972 elections approached, the California Supreme Court intervened, mandating that the preexisting assembly and senate districts be used for the election. *See id.* at 56. Because California had gained five congressional seats in reapportionment, however, the court imposed a redistricting plan for the election that had been vetoed by the Governor. *See Legislature v. Reinecke*, 492 P.2d 385, 390-91 (Cal. 1972). The court implored the legislature and Governor to reach an accord. *See id.* at 386-87. But agreement proved impossible. *See* Quinn 56. Governor Reagan and the legislature continued their standoff, and in 1973 the state supreme court again intervened. *See id.* This time, it appointed three retired judges as special masters, who created a new plan that the court substantially imposed in the fall of 1973. *See Legislature v. Reinecke*, 516 P.2d 6, 9 (Cal. 1973). In devising that plan, the masters sought to create competitive districts rather than "safe seats." *Id.* at 38 (appendix containing special masters' report and recommendations) (internal quotation marks omitted). Although the plan initially appeared to favor Democrats, the court-imposed districts proved more competitive than prior plans.

1981. After the 1980 Census, Democratic majorities controlled the legislature. *See Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988). In 1981, voting along party lines, the legislature adopted a new plan for congressional districts. *Id.* That plan, authored by Congressman Phillip Burton, was "considered one of the most notoriously partisan gerrymanders in recent years." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 573

(1993); *see also* John H. Fund, *Beware the Gerrymander, My Son*, Nat'l Rev., Apr. 7, 1989, at 34 ("Fund"). Congressman Burton drew contorted districts designed to reward his party and his friends. Notoriously, he drew a congressional district for his brother, John, that "included parts of four counties" and was connected in parts "only by water" or "by railroad yards." John Jacobs, A Rage for Justice: The Passion and Politics of Phillip Burton 435 (1995).

California voters qualified a referendum to rescind the so-called "Burtonmander," but the Democratic state assembly challenged the referendum in California's courts. *See Badham*, 694 F. Supp. at 666. The state supreme court upheld the referendum, but ordered that the Burton plan be used for the 1982 elections. *See Assembly v. Deukmejian*, 639 P.2d 939 (Cal. 1982); Fund 35. As a result, although voters "overwhelmingly rejected" the Burton plan at the June 1982 referendum election, Democrats made significant gains in the legislature and in Congress that November. *Legislature v. Deukmejian*, 669 P.2d 17, 35-36 (Cal. 1983) (Richardson, J., dissenting); *see also Badham*, 694 F. Supp. at 666; Fund 34.

Despite the voters' disapproval of the Burtonmander, at an extraordinary session that winter the legislature adopted a new plan—dubbed "Son of Burton"—making only minor changes to the rejected gerrymander and locking in the Democratic gains; it was signed by outgoing Governor Brown just hours before the new Republican Governor, *amicus* George Deukmejian, was sworn into office. Fund 35; *Badham*, 694 F. Supp. at 666. The legislature designated the new plan "urgency" legislation, precluding further use of the referendum power. *Deukmejian*, 669 P.2d at 36 (Richardson, J., dissenting).

California voters reacted again, qualifying an initiative that would have repealed the "Son of Burton" plan and replaced it with a new plan thought to embody "good government" principles. *See* Fund 35; *Deukmejian*, 669 P.2d at 36 (Richardson, J., dissenting). In another legal challenge by the Democratic legislature, however, the California Supreme Court prohibited a vote on the initiative, holding that under the California Constitution a valid redistricting could be enacted, whether by the legislature or by initiative, only once per decade, and "Son of Burton" was that plan. *Deukmejian*, 669 P.2d at 22-31. The following year, Republicans received an absolute majority (50.1%) of the congressional vote statewide, but only 40% of the State's congressional seats, giving rise to one of the first partisan gerrymandering cases. *Badham*, 694 F. Supp. at 670. A similar disparity prevailed throughout the decade. *See* Fund 34.

Led by *amici* Governors George Deukmejian and Pete Wilson, Republicans also attempted reform at the ballot box. Proposition 14 (1982) called for a ten-member redistricting commission composed of legislators and citizens. Proposition 39 (1984) would have created a redistricting commission. Both measures failed, as did other similar reform measures pursued in 1990.

1991. The 1991 redistricting followed the model of the 1971 process. A Democratic legislature squared off against Governor Wilson, who vetoed the legislature's efforts—again placing the matter in the California Supreme Court's hands. *Wilson v. Eu*, 816 P.2d 1306 (Cal. 1991). Again, the Court appointed special masters, who "excluded such political factors as the potential effects on incumbents or the major political parties" from the line-drawing process. *Wilson v. Eu*, 823 P.2d 545, 549 (Cal. 1992). Again, the

result was a more fair, balanced, and competitive set of seats. But the battles over redistricting did not subside.

2001. In 2001, rather than enacting a partisan gerrymander, the two parties in the legislature conspired to adopt a bipartisan or "sweetheart" gerrymander. That map "has been widely perceived as specifically designed to protect incumbent legislators of both major political parties and as serving that purpose well over the decade in which the redistricting map was in effect." *Vandermost v. Bowen*, 269 P.3d 446, 479 (Cal. 2012). Under that redistricting map, only one incumbent lost in 459 legislative and congressional general elections. *See id.* (quoting study).

In response, *amicus* Governor Arnold Schwarzenegger again pursued reform. Proposition 77 (2005) would have removed control of redistricting from the legislature and placed it in a panel of special masters, each retired judges. That measure was also defeated.

2008-2010. The people of California finally passed reform measures in 2008 and 2010. Through Proposition 11, in 2008 the people of California amended the state constitution to create the Citizens Redistricting Commission. In 2010, the people passed Proposition 20, which extended the Commission's authority to congressional redistricting. *See* Cal. Const. art. XXI, §§ 1-3. The voters ensured that the Commission remains democratically accountable by providing that the Commission's plans are subject to the referendum power. Cal. Const. art. XXI, § 2(i). This is a greater degree of accountability than previously existed because the referendum cannot be by-

passed by designating the maps "urgency" legislation. *See supra* at 30.

The redistricting that followed the 2010 census was the first in which the Commission adopted congressional districts.

B. The Framers foresaw that the regulation of congressional elections could produce the partisan battles, abusive practices, and legislative misconduct that have plagued California's redistricting history. James Madison recognized, for example, "that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices." 2 Farrand 240. Others observed that state legislatures could "make an unequal and partial division" of congressional districts, 2 Elliot 27 (Theophilus Parsons at Massachusetts ratifying convention), or adopt other measures "injurious to the freedom of election," 2 Documentary History 413 (Thomas McKean at Pennsylvania ratifying convention).

Although the Framers authorized Congress to override such abuse in the second part of the Elections Clause, they also enabled the people of each State, through the broad "discretionary power" provided in the first part of the Clause, 2 Farrand 240 (Madison), to provide a remedy—permitting them to remove redistricting authority from the elected legislature altogether and establish a process that would better serve the people's interests. *See supra* Part I.A. The people of California and Arizona have exercised that constitutional prerogative by delegating the redistricting power to independent commissions duly constituted under the laws of each State. *See* Cal. Const. art. XXI, §§ 1-3; Ariz. Const. art. IV, pt. 2.

California's history confirms the Framers' wisdom in entrusting each State with broad authority to regulate elections, including the task of devising procedures for drawing congressional districts. For decades, the California Legislature proved itself unwilling to draw congressional districts in a fair, representative manner—opting instead for districts that either entrenched the party that happened to dominate the legislature at that time or all incumbents regardless of party. Despite negotiations, judicial intervention, stopgap measures, and attempts at reform, nothing succeeded in stemming the legislature's abuse of the redistricting power. Given the severity of the problem that the people of California faced, the Framers wisely left them—and the people of each State—the discretion to delegate the redistricting power to an independent commission free of partisan motives and the distorting influence of incumbency.

CONCLUSION

The text, structure, and history of the Elections Clause make clear that the Clause permits the people of a State to delegate redistricting authority to an independent redistricting commission—a power that Congress confirmed when it enacted 2 U.S.C. § 2a(c). The district court's decision upholding the constitutionality of the Arizona Independent Redistricting Commission enables the people of the State to exercise the power granted to them by the Elections Clause and by Congress, and reserved to them by the Arizona Constitution. That decision should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-1314

IN THE
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,
v.
ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are individuals and non-profit organizations that are government, civic, and business leaders in Illinois, all of whom have a strong interest in promoting fair elections in Illinois.

Several of the individual *amici* are former high-ranking Illinois State officals from both the Democratic and Republican parties. The Honorable Jim Edgar was the Republican Governor of Illinois from 1991 to 1999. The Honorable Sheila J. Simon was the Democratic Lieutenant Governor of Illinois from 2011 to 2015. The Honorable Corinne J. Wood was the Republican Lieutenant Governor of Illinois from 1999 to 2003.

Other *amici* are civic, government, and business leaders in Illinois. Peter B. Bensinger served as Director of the Illinois Department of Corrections from 1970 to 1973. He also served as Administrator of the U.S. Drug Enforcement Administration from 1976 to 1981, and was the U.S. Department of Justice Representative to Interpol in 1978.

Ronald Gidwitz served as President, Chief Executive Officer and Director of Helene Curtis, a Fortune 500 consumer products company based in Chicago, Illinois. In 1998, he co-founded GCG

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief. Appellant Arizona State Legislature and Appellees Arizona Independent Redistricting Commission, et al. filed blanket consents to the filing of *amicus curiae* briefs, which were docketed on November 7, 2014, and January 13, 2015, respectively.

Partners, a strategic consulting and equity firm in Chicago, and has since served as partner at that firm.

Newton N. Minow served as Chairman of the Federal Communications Commission under President John F. Kennedy. He was subsequently a partner in the law firm of Sidley Austin LLP in Chicago from 1965 to 1991, and is currently senior counsel with the firm.

CHANGE Illinois is a non-profit organization working to help make Illinois a national model for fair, honest government. The organization leads coalition-driven policy research, public education, and advocacy initiatives on democracy and political reform issues. CHANGE Illinois produces detailed research reports on the State's redistricting process, and recently drafted a model redistricting amendment that incorporates an independent commission.

Illinois Campaign for Political Reform ("ICPR") is a non-profit and non-partisan public interest organization that conducts research and advocates reforms to promote public participation and to encourage integrity, accountability, and transparency in both Illinois government and election processes. ICPR facilitates bipartisan dialogue around a range of reform issues in order to advance honest, open, and accountable government and reinvigorate public confidence and civic involvement. ICPR has been deeply involved in several efforts to reform the redistricting process in Illinois.

Common Cause of Illinois is a non-partisan watchdog group whose mission is to promote open, ethical, and accountable government at the local, state, and national levels by educating and mobilizing

the people of Illinois. As part of those goals, Common Cause of Illinois actively supports reform of the congressional and state legislative redistricting process in Illinois. Most recently, Common Cause of Illinois was a founding member of the non-partisan coalition that worked to place an initiative to create an independent redistricting commission on the 2014 Illinois general election ballot.

The League of Women Voters of Illinois is a non-partisan political organization that encourages informed and active participation in government and elections, works to increase understanding of public policy issues and influences public policy through education and advocacy.

The Citizen Advocacy Center ("CAC") is an award-winning, non-profit, non-partisan free community legal organization. Founded in 1994, CAC's mission is to build democracy for the 21st Century by strengthening the citizenry's capacities, resources, and institutions for self-governance. CAC seeks to increase democratic protocols at every level of government and develop the voice of the public.

Amici submit this brief to highlight how the peculiar nature of Illinois's constitutional and political history has allowed a single party, based on a random drawing every ten years, to dominate the redistricting process and draw partisan maps that do not give the voters of Illinois meaningful choices about who will represent them in Congress. *Amici*'s experience with Illinois politics and reform efforts has shown that the lack of independent voice in congressional redistricting in Illinois allows the single-party controlled legislature, and that party's congressional delegation, to choose their constituents, rather than having constituents choose their

representatives. *Amici* stress the critical importance of allowing Illinois voters to have the option to organize and implement a voter-sponsored initiative for independent redistricting to change Illinois's long history of partisan redistricting.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Illinois faces a major political dilemma. State and congressional redistricting in Illinois is performed by the State's bicameral General Assembly. However, the redistricting process frequently ends up being controlled completely by one or the other political party, depending on a random drawing. Not surprisingly, the party winning that random drawing can and has used its resulting control of the process to attempt to entrench itself and its incumbents in power. While both parties have abused their positions when they have won the random drawing (Democrats in 1981 and 2001 and Republicans in 1990), currently the dominant party in the General Assembly, the Democratic party, has sole control of both state and federal legislative district lines. As a result of single party dominance of the redistricting process, there has been a steep decline in the number of competitive congressional elections in which Illinois voters have meaningful choices about who will represent them in Congress.

Illinois voters have few remedies, because the State Constitution does not offer broad or numerous opportunities for voters to effect policy change through referenda or voter initiatives. The Illinois Constitution does, however, contain a "safety valve" by allowing a voter initiative to amend one article of the Illinois Constitution—the Legislative Article. See

Ill. Const. art. XIV, § 3. This provision exists in recognition of voters' potential need to act independently to "overcome" any "reluctance on the part of the General Assembly to propose changes in its own domain." 7 *Record of Proceedings of 1969-1970, Sixth Illinois Constitutional Convention, Part 2: Committee Proposals, Member Proposals* 2677-78 (1972). Thus, despite its overall limitations on voter initiatives, the Illinois Constitution grants voters the authority to act independently—bypassing the legislature—in the face of legislative entrenchment. It thus authorizes voters to, for example, seek a constitutional amendment to establish an independent redistricting commission to oversee the drawing of legislative maps.

The Appellant's position, however, would nullify that authority in relation to congressional redistricting. The Arizona Legislature argues that under the Elections Clause of the U.S. Constitution, U.S. Const. art. I, § 4, cl. 1, a state's elected legislature (in Illinois, the General Assembly) is the sole "component of state government authorized to prescribe the necessary regulations, including those for congressional redistricting." Appellant Br. 30. The election by the people of a state to place redistricting authority anywhere other than the body denominated the "legislature"—even where that election is expressly permitted by the state constitution—is null and void, the Arizona Legislature says, because the Elections Clause does not permit it.

The Arizona Legislature's reading is not supported by the text, original understanding, or purpose of the Elections Clause. See Appellees Br. 23-27, 33-38, 39-44. It also fails to account for the federalist structure

of government established in the federal Constitution. That document does not purport to control how states and their citizens structure state government. To the contrary, the federal Constitution "'split[s] the atom of sovereignty'"—both preserving states' sovereignty and protecting it from incursion by the federal government. *Saenz* v. *Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). At the heart of state sovereignty—one of its defining features—is the state's authority to set forth the structure and processes of its own government, and to assign power internally within it.

This Court's decisions interpreting the Elections Clause confirm that that Clause does not effect a departure from the fundamental federalist principles underlying our constitutional structure. In both *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), and *Smiley* v. *Holm*, 285 U.S. 355 (1932), the Court explained that the Elections Clause permits states to assign legislative power over congressional redistricting, and a role within the state's legislative process, to actors other than the representative body denominated as the state's "legislature." In each instance, the Court made clear that the Elections Clause does not expand the power of a federal court to instruct a sovereign state as to how to structure internal state governmental operations. To be sure, the Elections Clause permits Congress to "make or alter" whatever "regulations" result from the state's governmental processes, but it does not undermine the state's sovereignty to establish its own state governmental processes in the first instance. U.S. Const. art. I, § 4, cl. 1.

Contrary to the Arizona Legislature's arguments, the Elections Clause does not constrain all states to adopt a single, federally mandated form of legislative process. To the contrary, the Elections Clause leaves each sovereign state and its citizens the power and flexibility to meet the unique needs presented by their situation. The Elections Clause thus does not hamstring the people of Illinois to accept an irrational and partisan redistricting process as their federally mandated lot—but instead preserves their power to overcome this Illinois-specific problem in the manner that Illinois, in the exercise of its sovereign authority and judgment, deems fit.

ARGUMENT

I. THE SOVEREIGN STATES RETAIN SOLE AUTHORITY OVER SELECTING THE STRUCTURE AND PROCESSES OF STATE GOVERNMENT.

A. States Are Self-Governing Sovereigns.

The federal Constitution creates a system of dual sovereignty, in which both the federal government and the states retain sovereignty. "By 'split[ting] the atom of sovereignty,' the Founders established 'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Alden* v. *Maine*, 527 U.S. 706, 751 (1999) (quoting *Saenz*, 526 U.S. at 504 n.17) (internal quotation marks omitted). This federalist system requires that the federal government refrain from trespassing on state sovereignty, and instead "treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.* at 748.

At the core of state sovereignty is the State's ability to determine its own government structure and composition. As this Court has explained, "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence .... [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas* v. *White*, 74 U.S. 700, 725 (1868) (citations omitted) (internal quotation marks omitted). Indeed, the authority to engage in self-determined governance is inherent in the very meaning of sovereignty: It is "[t]hrough the structure of its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991).

Accordingly, this Court has consistently held that "[a] State is entitled to order the processes of its own governance." *Alden*, 527 U.S. at 752; *accord Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) (recognizing "a State's constitutional responsibility for the establishment and operation of its own government"); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in result) ("It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the ... States."). The Constitution does not permit "plenary federal control of state governmental processes" because such an allowance would "denigrate[] the separate sovereignty of the States." *Alden*, 527 U.S. at 749. Instead, "the means and instrumentalities employed

for carrying on [States'] operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired . . . " *Collector* v. *Day*, 78 U.S. 113, 125 (1870), *overruled in part on other grounds by Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939); *accord Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.").

B. The Elections Clause Reflects This Basic Constitutional Principle.

The well-recognized principle of states' sovereignty over their own governmental structure must inform this Court's interpretation of the Elections Clause. That Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. The question before the Court is whether the Elections Clause should be read to permit states the flexibility to determine their own governmental process in connection with congressional redistricting, as they do in all other areas, or whether that Clause creates a unique federal authority over internal state governmental processes that pertain to congressional redistricting. The Arizona Legislature advocates the latter reading—contending that the

Elections Clause dictates precisely how states must assign their lawmaking power. The power to make laws in connection with congressional elections, the Arizona Legislature says, must be assigned to a single body of elected representatives denominated "the Legislature"—no matter what assignment of lawmaking power the state's own law may require.

As the Appellees demonstrate, the Arizona Legislature's self-serving interpretation is inconsistent with the text, original understanding, and purpose of the Elections Clause. Appellees Br. 23-27, 33-38, 39-44. It is also countermanded by the fundamental principle respecting the states' exclusive right to structure their governments.

The Court's decisions interpreting the Elections Clause make this clear. See *Hildebrant*, 241 U.S. 565; *Smiley*, 285 U.S. 355. Those cases hold that a state's self-determined governmental process for enacting legislation is permissible under the Elections Clause—even where the state's legislative process does not assign the decisive role to a lawmaking body denominated "the legislature."[2] In other words, as the Court's precedents establish, the Elections Clause preserves states' sovereignty, and allows states to retain flexibility, by authorizing states to place determinative authority over

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[2] Of course, whatever action a state may take concerning congressional redistricting remains subject to revision by the U.S. Congress. The Elections Clause provides that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. However, while Congress may override any "[r]egulations" promulgated through state governmental processes, the Elections Clause does not dictate in the first instance what form state governmental processes must take.

congressional redistricting in other players in states' legislative process beyond the entity called "the legislature."

In *Hildebrant*, the Court considered an argument from the Ohio General Assembly similar to that advanced by Appellant here. "By an amendment to the Constitution of Ohio . . . the legislative power was expressly declared to be vested not only in the senate and house of representatives of the state, . . but in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly." 241 U.S. at 566. The Ohio General Assembly passed an act redistricting the state for congressional elections, but the law was disapproved and nullified by popular referendum. *Id.* The general assembly contended that under the Elections Clause, it alone had power to legislate in connection with congressional redistricting, and "the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void." *Id.* at 567.

The Court rejected that argument. *Id.* at 570. As the Court explained, the argument was a challenge to the State's determination of how to organize its legislative power—and such a challenge was outside the purview of federal courts. The argument "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government, and causes a state where such condition exists to be not republican in form, in violation of the guaranty of the Constitution." *Id.* at 569 (citing U.S. Const. art. IV,

§ 4). By long-settled law, that is a non-justiciable question. *Id.*

The Court reached a similar result in *Smiley*. There, the Court rejected an argument that, when the Minnesota Governor vetoed a legislative map drawn by the Minnesota legislature, he unconstitutionally intruded on power delegated by the Elections Clause to the Minnesota legislature alone. The Court explained that the Elections Clause does not purport to federalize states' use of their legislative power in the area of congressional redistricting: "We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley,* 285 U.S. at 367-68. To the contrary, "[w]hether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state polity. Article 1, § 4, of the Federal Constitution, neither requires nor excludes such participation." *Id.* at 368. The Court went on to explain that any contrary reading of the Elections Clause would require "clear and definite support"—which was lacking. *Id.* at 369. In sum, the Court explained, "there is nothing in article 1, § 4, which precludes a state" from using its established governmental processes for legislating in connection with congressional redistricting "as in other cases of the exercise of the lawmaking power." *Id.* at 372-73.

The Arizona Legislature's reading of the Elections Clause as dictating states' governmental structure cannot be squared with these decisions. The Arizona Legislature argues that *Smiley* and *Hildebrant* are

consistent with its position because they "contemplate a continuing role—indeed, a continuing, preeminent role—for the state legislature in prescribing congressional districts." Appellant Br. 44. But in neither case did the Court even suggest that the quantum of authority retained by the body denominated as the State "legislature" made any difference. To the contrary, in both cases, the Court emphasized that the involvement of other political actors—in the form of voters directly, or the Governor—was a matter for the State, not a federal court, to decide.

The Arizona Legislature further argues that *Hildebrant* and *Smiley* are distinguishable because those cases "sought a special exception from the ordinary legislative process for laws dealing with congressional elections." Appellant Br. 45. This, too, is error. Those cases do not hold that a state acts consistent with the Elections Clause only when it provides for "ordinary" legislative processes in connection with congressional redistricting. Instead, they hold that what legislative processes apply to congressional redistricting "is a matter of state polity"—and that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 368. Thus, just as the Elections Clause required no exception from state-determined legislative processes in those cases, the Elections Clause likewise requires no exception for the Arizona Legislature from the legislative process that its State has established for congressional redistricting.

The Arizona Legislature's reading of the Elections Clause to severely constrain the states' sovereignty in the area of congressional redistricting is a remarkable departure from the basic federalist principles that underlie the entire federal Constitution. If the Elections Clause means what the Arizona Legislature says, then that Clause requires federal courts to rewrite state constitutional provisions that assign state governmental power to state entities, even over the voters' express decisions through initiatives or referenda. Such an action by a federal court is a direct violation of "the etiquette of federalism." *United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). And this interpretation could be supported only by a clear statement that the Framers actually intended such a departure. See *Smiley*, 285 U.S. at 369; cf. also *Gregory*, 501 U.S. at 460. "Certainly, the terms of the constitutional provision furnish no such clear and definite support" for that construction. *Smiley*, 285 U.S. at 369. The Elections Clause must instead be read, consistent with our nation's federalist structure, to allow each state to "define[] itself as a sovereign" by determining its own governmental structure and processes. *Gregory*, 501 U.S. at 460.

II. ILLINOIS'S EXPERIENCE DEMONSTRATES THE NEED OF EACH SOVEREIGN STATE TO RETAIN CONTROL OVER ITS OWN GOVERNMENT PROCESSES.

As this Court has recognized, the Constitution's "federalist structure of joint sovereigns preserves to the people numerous advantages." *Gregory*, 501 U.S. at 458. In particular, the federalism created by the Constitution "assures a decentralized government that will be more sensitive to the diverse needs of a

heterogenous society." *Id.* By creating localized, smaller-scale sovereigns; our federalist structure ensures that state governments respond to concerns presented in a particular region—even where those concerns do not pose an issue of importance to the entire nation. Additionally, by establishing more locally controlled government, federalism "increases opportunity for citizen involvement in democratic processes." *Id.* And significantly, by allowing every state to chart its own course in self-governance, our federalist structure "allows for more innovation and experimentation in government." *Id.*; *accord Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism . . . allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times . . . .").

Each of these benefits of federalism is furthered through full recognition of state sovereignty in the context of the Elections Clause. Throughout the nation's history, the various states have encountered diverse political obstacles and have devised a wide variety of responsive measures. One problem broadly faced is partisan gerrymandering. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (agreeing that "severe partisan gerrymanders" are "incompatib[le]" with "democratic principles") (Scalia, J.) (plurality opinion); *id.* at 361 (Breyer, J., dissenting) ("The democratic harm of unjustified entrenchment is obvious."). While the ill effects of partisan gerrymandering are undoubted, the Court has made clear that this is fundamentally a question for political—not judicial—resolution. *Id.* at 292-94 (plurality opinion).

Our federalist system allows states the freedom to devise their own political solutions to this profound problem. With individual states addressing the issue separately, states can achieve solutions that are innovative, that address the local forces behind gerrymandering in that state's experience, and that conform to the state's history and the political preferences of the state's citizens. In short, the interpretation of the Elections Clause that this Court has adopted not only is compelled by the federalist structure of the Constitution, but—unsurprisingly—achieves the very aims that that federalist structure was designed to promote.

This is exemplified by the experience of the State of Illinois. In Illinois, partisan legislative redistricting has—over the last few decades—contributed to the decrease in voter choice in legislative and congressional elections. As explained below, because of a peculiar provision in the Illinois Constitution and a confluence of history and politics, the party that controls the legislative redistricting process is often determined by the flip of a coin. The Democrats won that coin toss in 1981, and the Republicans in 1991, resulting in maps that favored whichever party controlled it. The Democratic Party now has had sole control of drawing state and congressional legislative maps for two consecutive cycles—in 2001 and 2011. This extended duration of single-party redistricting has allowed that party to solidify its power in both the Illinois House and Senate to create veto-proof Democratic majorities since 2010, which means that Democratic control of redistricting for both state and congressional elections is secured for the indefinite future.

If this endless cycle of partisan redistricting is to be overcome in Illinois, it may well require that action be taken by someone other than the General Assembly, which is the legislative body that currently draws the map of state legislative and congressional districts. And the framers of the Illinois Constitution provided for just such a circumstance. Unlike Arizona, where citizen initiatives are relatively common and easy to undertake, see Appellees Br. 6, voter-led amendments to the Illinois Constitution are rarely permitted. In Illinois, voter-led amendments are available only to amend the Legislative Article of the Illinois Constitution, and are "limited to structural and procedural subjects contained in Article IV." Ill. Const. art. XIV. § 3. The Official Text with Explanation of the Proposed 1970 Constitution explains that the Illinois Constitution made allowance for such amendments in this one vital area to ensure that "a reluctance on the part of the General Assembly to propose changes in its own domain can be overcome." 7 *Record of Proceedings of 1969-1970, Sixth Illinois Constitutional Convention, Part 2: Committee Proposals, Member Proposals, supra*, at 2677-78.

Thus, while Illinois has not, like some of its sister states, broadly adopted voter referenda as a means of self-governance, Illinois's constitution establishes a voter-led legislative process to overcome the very problem that now faces the State: partisan gerrymandering by the party that dominates the General Assembly. The federalist principles outlined above require that the people of the sovereign State of Illinois be permitted to exercise this authority pursuant to the processes that the State has established.

A. In Illinois, A Random Drawing Allows A Single Political Party To Draw The Legislative Map.

"The redistricting process in Illinois has always been a source of unrivaled political gamesmanship as the state's own redistricting procedure helps to accommodate partisanship." Joe Cervantes & Logan Fentress, *Redistricting in Illinois: A Comparative View on State Redistricting*, The Simon Review, April 2012 at 11. The current redistricting process in Illinois was set in place by the 1970 Illinois Constitution. Ill. Const. art. IV, §§ 2, 3. In the year following each census year, the Illinois General Assembly[3] "by law" shall redistrict the legislative and representative districts. Ill. Const. art. IV, § 3(b). The General Assembly can pass a bill containing new district boundaries, and that bill can become law in the same manner as any other piece of legislation. Ill. Const. art. IV, § 3; Cynthia Canary & Kent Redfield, CHANGE Illinois, *Backroom Battles & Partisan Deadlock: Redistricting in Illinois* 12 (2014).

In 1971, just one year after the new 1970 Constitution was ratified, the Republicans and Democrats in the General Assembly could not agree on a legislative map because, despite the declining population of Chicago, Democrats sought to retain their 21 city-controlled districts. Paul M. Green, Ill. Comm'n on Intergovernmental Cooperation, *Legislative Redistricting in Illinois: An Historical Analysis* 18-19 (1987). Suburban Republicans resisted Chicago Democratic map efforts, and the

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[3] The Illinois General Assembly is the state legislature of the State of Illinois and comprises the Illinois House of Representatives and the Illinois Senate. Ill. Const. art. IV, § 1.

divided Illinois General Assembly failed to put forth a new map. *Id.*

Under the 1970 Constitution, if the General Assembly fails to act, a "Legislative Redistricting Commission" ("LRC") must be created. Ill. Const. art. IV, § 3(b). The LRC consists of eight members, "no more than four of whom shall be members of the same political party." *Id.* Each of the State's four legislative leaders names two members—one Representative and one person who is not a member of the General Assembly. *Id.* The LRC is therefore evenly divided by political party, and evenly divided by members and non-members of the General Assembly. There are no "independent" members of the LRC.

Because the LRC is composed of an equal number of members from each party, the constitutional delegates recognized that it could produce a tie, and the Illinois Constitution therefore provides for a "tie-breaker" provision that is unique to Illinois. *Id.*; Canary & Redfield, *supra*, 12-13; John S. Jackson & Lourenke Prozesky, *Redistricting in Illinois*, The Simon Review, April 2005 at 1. If the LRC cannot agree on a map, the Illinois Supreme Court provides two names—one from each political party, one of those names is randomly and publicly drawn, and that person becomes the ninth member of the LRC. Ill. Const. art. IV, § 3(b). Under this "tie-breaker," the outcome of the legislative map is effectively the same as the flip of a coin. The nine-member Redistricting Commission—no longer evenly divided—is then required to submit a map approved by at least five members. *Id.*

The framers of the 1970 Illinois Constitution believed that the "tie-breaker" provision would be

rarely invoked because both parties would recognize that a compromise map would better serve their interests than one controlled by the other party. Canary & Redfield, *supra*, at 13-14; 6 *Record of Proceedings of 1969-1970, Sixth Illinois Constitutional Convention, Part 1: Committee Proposals, Member Proposals* 1566b–66d (1972). In 1971, the Illinois Supreme Court explained:

> It is abundantly clear that the intent of the delegates to the 1970 Constitutional Convention was to create a redistricting commission composed of four legislators and four public members, and that their purpose in doing so was to bring into the commission a fresh, perhaps more objective, approach to the apportionment problems which had deadlocked the legislature. By requiring one half of the commission's membership to be individuals not therefore involved in the legislative redistricting struggles, the prospects of the commission's success were thought to be enhanced.

People ex rel. Scott v. *Grivetti*, 277 N.E.2d 881, 885 (Ill. 1971). In 1971, the "tie-breaker" provision appeared to have the effect the delegates to the 1970 Constitutional Convention intended, and the 1971 LRC agreed on a compromise map. Green, *supra*, at 19.

But 1971 was the last year that the LRC could agree on a map without the tie-breaker. In 1981, after a highly contentious LRC failed to agree on a map, the Illinois Supreme Court was forced to submit two names, which were placed in a black top hat once worn by Abraham Lincoln. *Id.* at 22. The absurdity of this process has been aptly described as follows:

> After months of debate, hours of strategy sessions, thousands of dollars of computer time, the collected wisdom gained from 110 years of reapportionment history, and the reform redistricting procedures placed in the 1970 constitution, the 1981 legislative reapportionment process came down to its single most important act: Secretary Edgar drew [Democrat] Governor Shapiro's name out of a hat.

Id.[4] The LRC approved the Democratic legislative map on a straight 5-4 party vote. *Id.* at 23. The map was challenged in court, but a three-judge panel decided not to "discard the entire Commission Plan because part of it [was] infected by an unconstitutional purpose to dilute." *Rybicki* v. *State Bd. of Elections of the State of Ill.*, 574 F. Supp. 1082, 1125 n.106 (N.D. Ill. 1982).

In 1991, the tie-breaker provision was again invoked, but this time a Republican name was drawn from the hat. Jackson & Prozesky, *supra*, at 9. The Democratic Attorney General challenged the validity of the Republican-friendly map under the Illinois Constitution. *Ryan*, 588 N.E.2d 1033. The Illinois Supreme Court, by a 4-3 vote, fundamentally upheld the map, but a number of justices acknowledged that the map had been "drawn with a view to securing a partisan political advantage." *Id.* at 1038 (Heiple, J.,

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[4] For its part, the Illinois Supreme Court has described the tie-breaking process as "tortuous . . not in the best interests of the voters of this State . . we do not find that a lottery or a flip of a coin is in the best interests of anyone except the party which has won the toss. The rights of the voters should not be part of a game of chance." *People ex rel. Burris* v. *Ryan*, 588 N.E.2d 1033, 1035 (Ill. 1992).

Oklahoma was the first state to include initiative and referendum provisions in its Constitution at the time it was admitted to the Union. John David Rausch, *Initiative and Referendum*, Okla. Historical Soc'y, http://www.okhistory.org/publications/enc/entry.php?entry=IN025 (last visited Jan. 22, 2015). Article V, Section 1 created a legislature comprised of a Senate and House of Representatives, but the same section reserved for the people "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and [the] power at their own option to approve or reject at the polls any act of the Legislature." Okla. Const. art. V, § 1.

Arizona's Constitution spoke as plainly as Oklahoma's in preserving legislative power for the people, setting forth the principle that:

> [Legislative power] shall be vested in the legislature but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

Ariz. Const. art. IV, pt. 1, § 1(1). New Mexico's original Constitution vested power in the Senate and House of Representatives, but reserved for the people "the power to disapprove, suspend and annul any law

enacted by the legislature," with certain exceptions. N.M. Const. art. IV. § 1.

Half a century after Congress and the President approved the Constitutions of Oklahoma, New Mexico, and Arizona, Alaska's Constitution also reserved legislative power to its citizens. In Article XI, the Alaska Constitution provides that "[t]he people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum."[15] Alaska Const. art. XI, § 1.

Notably, the congressional debates of 1911, concerning potential statehood for Arizona and New Mexico, focused heavily on direct democracy provisions included in the territories' proposed constitutions. Much of the controversy centered around Arizona's inclusion of a provision that would allow popular recall of judges,[16] but the initiative and referendum provisions were also hotly debated. Charles O. Lerche, Jr., *The Guarantee of a*

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[15] Congress approved Alaska's Constitution that included initiative and referendum provisions in 1958, two decades after Arkansas citizens had used the initiative power to create a redistricting commission for state legislative races. *See* Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 346 (2007).

[16] President Taft vetoed the first resolution that would have admitted Arizona and New Mexico into the Union because of Arizona's judicial recall provision. Arizonans removed the provision, Taft signed the second statehood bill in 1912, and the citizens of Arizona promptly inserted a new recall provision in the fall of 1912. *See, e.g.*, Jana Bommersbach, *Arizona's Statehood Story*, Ariz. Republic, Nov. 27, 2010, *available at* http://archive.azcentral.com/arizonarepublic/viewpoints/articles/20101127arizona-statehood-boomersbach.html.

Republican Form of Government and the Admission of New States, 11 J. Pol. 578, 598-601 (1949).

Despite the fact that the proposed initiative power clearly would allow the people of the new states to enact electoral rules by initiative, there was no objection on that basis from Congress.

On the heels of each debate, Congress determined each territory should be admitted to the Union with the direct democracy provisions in place. Over one hundred years ago, this included Arizona. The state later used its initiative power—accepted as lawful during the state's admission to the Union—to create its Independent Redistricting Commission.

Congress' repeated acquiescence in these direct democracy provisions at the very least demonstrates a widely shared constitutional understanding over two centuries. Moreover, each instance can be seen as a meaningful decision not to preempt state practices under the Elections Clause.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the Court affirm the decision below.

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AMICUS CURIAE BRIEF

No. 13-1314

In The
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT
REDISTRICTING COMMISSION, et al.,

Appellees.

**On Appeal From The United States
District Court For The District Of Arizona**

BRIEF OF CALIFORNIA CITIZENS REDISTRICTING COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE ARIZONA INDEPENDENT REDISTRICTING COMMISSION

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INTEREST OF *AMICUS CURIAE*[1]

CALIFORNIA'S CITIZENS REDISTRICTING COMMISSION

California's Citizens Redistricting Commission submits this brief as *amicus curiae* in support of appellee Arizona Independent Redistricting Commission. This brief addresses the first question of this Court: "1) Do the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts?"

Appellee Arizona Independent Redistricting Commission was created by the voters of Arizona, acting pursuant to their legislative power to amend the state constitution and statutes through initiatives, and this commission was given the task of redistricting Arizona's congressional districts and various state districts. Ariz. Const., art. IV, pt. 2, § 1; Prop. 106, adopted November 2000. Similarly, the voters of California used their legislative power of initiative to create the California's Citizens Redistricting Commission with the power to draw congressional districts and state election districts. Cal. Const.,

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its members and counsel have made any monetary contribution for the preparation or submission of the brief. Letters from the parties consenting to the filing of any *amicus curiae* brief are on file with this Court.

art. XXI, §§ 1, 2; Prop. 11, adopted November 2008 and Prop. 11, adopted November 2010.

Appellant Arizona Legislature contends that only it may establish congressional districts in Arizona, and that the decision of the people, pursuant to their initiative power, to have these districts drawn by an independent commission violates federal law. Specifically, appellant argues that shifting the authority to draw congressional districts away from elected state representatives in Arizona, to an independent commission created by their voters' initiative power, violates the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c)

California's Citizens Redistricting Commission has a direct and vital interest in protecting the judgment below, which upheld the creation and redistricting power of Arizona's Independent Redistricting Commission. Any decision by this Court holding that Arizona's redistricting process, enacted by initiative, violates federal law would place in jeopardy California's own redistricting process.

SUMMARY OF ARGUMENT

Traditionally, elected state representatives draw the lines for congressional and state election districts, but in both Arizona and California, voters have replaced the customary redistricting procedures. Through their initiative power to enact legislation, the voters in each state created an independent commission to

draw election districts. The people's power to legislate by initiative and referendum is guaranteed in both California's and Arizona's Constitutions, and the power to legislate by initiative and referendum has been recognized by this Court as demonstrating devotion to democracy and innovation. The use of this initiative power to establish a process by which an independent commission, and not elected state representatives, draws congressional districts does not violate federal law.

"All political power is inherent in the people." Cal. Const., art. II, § 1; Ariz. Const., art. II, § 2. While the California and Arizona Constitutions vest legislative power in the state legislatures, neither state legislature has the exclusive power to make laws. Both state constitutions reserve to the people of each state the powers of initiative and referendum. Cal. Const., art. IV, § 1; Ariz. Const., art. IV, pt. 1, § 1. The electors in both California and Arizona are constitutionally guaranteed the authority to amend their state constitutions and statutes by means of initiative measures. Cal. Const., art. II, §§ 8, 10; Ariz. Const., art. IV, pt. 1, § 1.

The electors in California exercised their legislative power of initiative to create California's Citizens Redistricting Commission (CRC) and to empower CRC to draw congressional and state district lines. *Vandermost v. Bowen,* 53 Cal.4th 421, 438, 269 P.3d 446 (2012). By initiative, the California Constitution was amended by the addition of Article XXI, which created CRC, established the requirements for CRC

Commissioners, and set the standards CRC must follow in line-drawing. In addition, the California Government Code was amended by the addition of Sections 8252 to 8253.6 to Chapter 3.2 of Division 1 of Title 2, which established the selection process for CRC Commissioners and further defined CRC procedures.

Likewise, Arizona's Independent Redistricting Commission (IRC) was created by Arizona's initiative process. Ariz. Const., art. IV, pt. 2, § 1; Prop. 106, adopted Nov., 2000.

The state initiatives creating the CRC and the IRC do not conflict with the Elections Clause of the United States Constitution. This clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof" except as Congress otherwise provides. U.S. Const., art. I, § 4, cl. 1. However, neither the Elections Clause nor any other provision in the federal Constitution or federal law defines what is meant by the term "Legislature." To the contrary, the federal Constitution, with exceptions not applicable here, leaves the states free to determine for themselves their own legislative procedures and form of government, so long as it is a "republican form of government." Guarantee Clause, U.S. Const., art. IV, § 4. Where, as in California, Arizona, and many other states, both the people of the state and the elected state representatives are lawmaking bodies, both constitute the "Legislature" for purposes of the Elections Clause.

The federal statute implementing the Elections Clause, 2 U.S.C. § 2a(c), makes it even more clear that the process by which a state law is enacted is irrelevant for purposes of determining what state law governs redistricting procedures for congressional districts. This section provides that the congressional districts of a state are to be "redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c). "[T]he law thereof" is not limited to laws enacted by the elected state representatives, but instead encompasses all state laws, including those enacted by initiative. Where, as here, an initiative passed by the voters provides that an independent commission is responsible for establishing congressional districts, the actions of the commission are carried out "in the manner provided by [state] law."

Furthermore, the redistricting process created by initiatives in California and Arizona ensures that a body fairly representing the various political and other interests in the state, by an impartial process open to public view and input, draws congressional lines that comply with federal constitutional and statutory standards, without consideration of political parties or candidates. This process results in congressional and state election districts that are fully consistent with and lawful under federal law.

The decision of the three-judge court should be affirmed.

ARGUMENT

I. STATE LAWS MAY BE ENACTED BY INITIATIVE TO FURTHER DEMOCRACY AND INNOVATIVE GOVERNING, AS CALIFORNIA AND ARIZONA HAVE DONE

A. IN CALIFORNIA AND ARIZONA, ALONG WITH MANY OTHER STATES, THE PEOPLE MAY ENACT LAWS AND AMEND STATE CONSTITUTIONS, AND THIS POWER IS EQUAL TO THAT OF ELECTED STATE REPRESENTATIVES

States retain substantial self-governing authority under our constitutional system, because "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458.

Under this system of dual sovereignty, nothing in federal law precludes the states from having their voters decide issues that would otherwise be decided

by their elected state representatives. As this Court explained in rejecting a claim that providing for a referendum was an unlawful delegation of power, "[i]n establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976). Both California and Arizona, along with many other states, have reserved to the people the powers of initiative and referendum.[2]

When state constitutions authorize their people to vote directly on laws, by means of initiative and referendum, they increase public participation and "give citizens a voice on questions of public policy." *James v. Valtierri*, 402 U.S. 137, 141 (1991) (discussing the referendum power as a "procedure for democratic decision-making.") See, also, *Schuette v. Coalition to Defend Affirmative Action etc.*, ___ U.S. ___, ___, 134 S.Ct. 1623, 1626 (2014) (plurality opinion),

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[2] "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." Cal Const., art. IV, § 1. "The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature." Ariz. Const., art. IV, pt. 1, § 1.

where this Court upheld a constitutional amendment enacted by initiative that prohibited the consideration of race in public education, employment, and contracting. "Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power, bypassing public officials they deemed not responsive to their concerns. " *Schuette*, 134 S.Ct. at 1626.

When the electorate uses its initiative power, it acts as the Legislature. "[I]nitiatives are plainly 'legislation'. . ." *Cammarano v. United States*, 358 U.S. 498, 505 (1958) (determining that expenses incurred combating initiatives are no different than expenses incurred defeating legislation).

In California, initiatives adopted by the voters are equal to legislation adopted by elected state representatives. As the California Supreme Court has explained, "to the extent that the initiative is the constitutional power of the electors 'to propose statutes . . . and to adopt or reject them' (Cal. Const., art. II, § 8, subd. (a)), it is generally coextensive with the power of the Legislature to enact statutes." *Santa Clara County Local Transportation Authority v. Guardino*, 11 Cal.4th 220, 253, 902 P.2d 225 (1995). See, also, *Professional Engineers in California Government v. Kempton*, 40 Cal.4th 1016, 1042, 115 P.3d 226 (2007). "Apart from procedural differences, the electorate's lawmaking powers are identical to the Legislature's." *State Comp. Ins. Fund v. State Bd. of Equalization*, 14 Cal.App.4th 1295, 1300, 18 Cal.Rptr.2d

526 (1993). See, also, *Jensen v. Franchise Tax Bd.*, 178 Cal.App.4th 426, 440, 100 Cal.Rptr.3d 408 (2009).

B. CALIFORNIA AND ARIZONA, BY INITIATIVE, ADOPTED A REDISTRICTING PROCESS CONDUCTED BY A REPRESENTATIVE BODY, IN A MANNER THAT IS IMPARTIAL, OPEN TO THE PUBLIC, WITHOUT POLITICAL CONSIDERATIONS, AND IN FULL COMPLIANCE WITH FEDERAL LAW

California voters, like those in Arizona, exercised their democratic power to legislate by initiative, a power identical to that of the state legislatures' power to legislate, to create an independent commission to draw congressional and state election districts.

> Prior to 2008, redistricting in California was performed by the Legislature subject to the veto [citations omitted.] The electorate, however, dramatically changed the process by ballot measures in 2008 and 2010. Those measures amended California Constitution, article XXI, transferring the redistricting task to a newly created Citizens Redistricting Commission. (Prop. 11, as approved by voters, Gen. Elec. (Nov. 4, 2008) (Proposition 11); Prop. 20, as approved by voters, Gen. Elec. (Nov. 2, 2010) (Proposition 20).)

Vandermost, 53 Cal.4th at 443. Indeed, Proposition 20, which shifts the task of drawing congressional districts to CRC, was approved by over 60% of the

voters in California. (http://www.sos.ca.gov/elections/ballot-measures/pdf/approval-percentages-initiatives.pdf)

The process adopted by the California electorate and governing CRC, as well as that governing IRC, is different than traditional line-drawing procedures, but this process preserves essential values, including having a representative body draw district lines, being transparent, and inviting public input. Furthermore, CRC and IRC are expressly mandated to comply with federal law. Nothing in federal law precludes states from establishing independent commissions to draw congressional districts.

Looking to the process in California, its voters decided that CRC Commissioners must be "independent from legislative influence and reasonably representative of this State's diversity." Cal. Const., art. XXI, § 2(c)(1). Five commissioners are to be from a subpool of those registered with the largest political party in California; five are to be from a subpool of those registered with the second largest political party; and four must not be registered with either of these two parties. Cal. Const., art. XXI, § 2(c)(2). The selection process[3] guarantees a diverse and qualified body, selected on the basis of analytical skills, ability to be impartial, and appreciation for California's

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[3] More than 36,000 persons applied to be Commissioners. CRC's Final Report on 2011 Redistricting, p. 1 (Final Report); http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.

diversity, excluding persons with recent and direct political activity, with the applicant subpools selected by independent auditors who were themselves representative of various political parties. Cal. Gov't Code § 8252(d). After the applicant subpools are created, the four legislative leaders have an opportunity to exercise two strikes as to each subpool, that is, a total of eight possible strikes for each subpool. Gov't Code § 8252(e). "The constitutional provision creates a body that excludes career politicians, reflects citizen participation at every level, and is expected to rise above partisanship." *Vandermost*, 53 Cal.4th at 443.

As a result, the CRC Commissioners for the redistricting after the 2010 census are a distinguished and diverse group of citizens, including a former director of the U.S. Census Bureau who served under both Republican and Democratic Presidents, as well as educators, legal scholars, former government officials, business leaders, and other well-qualified voters.[4]

The Commissioners are obliged to apply specified criteria, in a designated order of priority, in drawing the districts. Foremost among these criteria is compliance with federal law, and, specifically, the federal Voting Rights Act. The other criteria are geographic contiguity, geographic integrity of political

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[4] The biographies of Commissioner Vincent P. Barabba, former U.S. Census Bureau Director, and the other Commissioners may be viewed at http://wedrawthelines.ca.gov/bios.html.

subdivisions and communities of interest, and compactness. Cal. Const., art. XXI, § 2(d). Political concerns are specifically excluded from consideration in drawing districts. Cal. Const., art. XXI, § 2(e). "Under California Constitution, article XXI, redistricting is now performed by a Citizens Redistricting Commission, whose membership and procedural requirements are carefully designed to ensure that redistricting is undertaken on a nonpartisan basis." *Vandermost*, 53 Cal.4th at 469.

The meetings of CRC are subject to strict open meeting laws, guaranteeing transparency and an opportunity for public input. Cal. Const., art. XXI, § 2(b)(1). All meetings are public, with notice and public input; a public outreach program solicits public participation; all records are public and available for public inspection; and all proposed maps must be publicly displayed and available for public comment before final adoption by CRC. Cal. Gov't Code § 8253.[5]

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[5] CRC's redistricting process was "open, transparent and nonpartisan. . . ." *Vandermost*, 53 Cal.4th at 484. As the California Supreme Court described this process in rejecting a challenge to CRC's state senatorial districts:

> The Commission . . . held more than 70 business meetings and 34 public hearings in 32 cities throughout the state. (Final Rep., at p. 4.) Generally, the Commission's hearings were scheduled in the early evening hours at school or government locations in the center of a community, making it convenient for "average citizens" to participate. (*Ibid.*) It regularly allowed public input and comment at its business meetings as well. (*Ibid.*) Its educational materials

(Continued on following page)

And, each map has to be approved by at least nine Commissioners, including at least three Commissioners from each of the two largest political parties and three who are not registered with either of these parties. Cal. Const., art. XXI, § 2(c)(5).

After maps are approved by the Commission, any voter may file a petition if he or she believes a map violates federal or state law, with the California Supreme Court having original and exclusive jurisdiction. Cal. Const., art. XXI, § 3. And, each map is also subject to the people's power of referendum. Cal. Const., art. XXI, § 2(i). Finally, if the Commission

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were broadly distributed in English and six other languages (Spanish, Chinese, Japanese, Korean, Tagalog, and Vietnamese), and it ultimately received, in addition to oral testimony, more than 2,000 written submissions, including maps reflecting statewide, regional, or other districts. (*Ibid.*; see also Final Rep., at 446 pp. 3-5 [listing representative groups providing submissions and other testimony].) The Commission's staff received "written comments, input and suggestions from more than 20,000 individuals and groups." (*Id.*, at p. 5.) The Commission held 23 public input hearings before issuing a set of its draft maps in June of 2011. After a five-day public review period, it held 11 more public input hearings around the state to collect reactions to and comments concerning those draft maps. (*Ibid.*) It held 22 business meetings in Sacramento to discuss the draft maps, at which more than 276 people appeared and commented. All of the Commission's public meetings were "live-streamed," captured on video, and placed on the Commission's Web site for public viewing.

Vandermost, 53 Cal.4th at 445-446.

fails to adopt a map in a proper and timely manner, if a map is subject to a successful referendum, or if the California Supreme Court finds a map to violate federal or state law, that Court is to order appropriate relief, including the appointment of special masters to adjust the map. Cal. Const., art. XXI, § 2(j) and § 3(c).

The entire process is designed to eliminate political influence in line-drawing. The Commissioners must not have been recently involved in political activity and are to be representative of California's diverse population. Cal. Const., art. XXI, § 2(c). In drawing districts, one guiding principle is that "[t]he place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party." Cal. Const., art. XXI, § 2(e). Instead, CRC must apply fair and rational line-drawing criteria in a given rank order, including population parity; compliance with the federal Voting Rights Act (42 U.S.C. §§ 1971 *et seq.*); geographic contiguity; common social and economic interests; and geographical compactness. Cal. Const., art. XXI, § 2(d).

This process resulted in congressional districts with an astonishingly high degree of population equality. "[T]he Commission's congressional district maps achieved a total deviation of +/- 1 person. Specifically, 20 of the 53 congressional districts achieved the ideal population of 702,905 persons. Twelve of the 53 districts achieved a population of 702,906 persons,

or one person more than the ideal. Twenty-one of the 53 districts achieved a population of 702,904 persons, or one person less than the ideal." CRC's Final Report on 2011 Redistricting, p. 9; http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.

The provisions governing CRC are quite similar to those of Arizona's IRC. The five-member IRC may include no more than two members of any one political party, with no Commissioner recently holding elective office or involved in politics; three or more votes are required for any official action; meetings have to be open to the public; and proposed maps must be displayed for public comment. Finally, under Arizona law, the IRC must apply specified criteria in its map drawing, including compliance with federal law, equal population, geographic compactness and contiguity, communities of interest, geographic features, local government boundaries, and competitiveness. Ariz. Const., art. IV, pt. 2, § 1. Furthermore, "[p]arty registration and voting history data shall be excluded from the initial phase of the mapping process" and "[t]he places of residence of incumbents or candidates shall not be identified or considered." Ariz. Const., art. IV, pt. 2, § 1(14).

Thus, the redistricting process in both California and Arizona, established by legislation enacted by initiative, are conducted by a representative body, in a transparent process that included public input, in compliance with federal redistricting standards, and without political considerations.

C. THE CREATIONS OF CALIFORNIA'S AND ARIZONA'S INDEPENDENT REDISTRICTING COMMISSIONS ARE AN APPROPRIATE MEANS TO PREVENT POLITICAL GERRYMANDERING

Political gerrymandering may violate the federal Constitution, and may also be forbidden by the states. As to federal law, this Court said in *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), political gerrymandering issues are justiciable.[6] In that case, however, the Court declined to find a "sufficiently adverse effect on the appellees' constitutionally protected rights to make out a violation of the Equal Protection Clause." *Id.*, at 130.

This Court again reviewed gerrymandered redistricting plans in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*). The Court recognized that "[f]aced with a Republican opposition that could be moving toward majority status, the state legislature drew a congressional redistricting plan designed to favor Democratic candidates." *LULAC*, 548 U.S. at 411 (Kennedy, J., joined by Roberts, C.J., and Alito, J.). Then this plan was replaced by a plan "to redistrict with the sole purpose of achieving a Republican congressional majority." *Id.*, at 417 (Kennedy, J.). In that case, however, there was

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[6] But see *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality of four Justices would have held that "political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.").

no agreement as to whether unconstitutional partisan gerrymander existed or was justiciable in that case.

Whatever the status of federal case law limiting political or partisan gerrymandering in redistricting, this is certainly an issue Congress or the states may address, as this Court has already recognized. Under the Elections Clause and the power it reserves to Congress, which "may at any time by law make or alter [the states'] regulations" as to redistricting, Congress itself could, although to date has not, banned political gerrymander. See *Vieth v. Jubelirer,* 541 U.S. 267, 276 (2004) ("Recent history, however, attests to Congress's awareness of the sort of districting practices appellants protest, and of its power under Article I, § 4, to control them. Since 1980 [until 2004], no fewer than five bills have been introduced to regulate gerrymandering in congressional districting. See H.R. 5037, 101st Cong., 2d Sess. (1990); H.R. 1711, 101st Cong., 1st Sess. (1989); H.R. 3468, 98th Cong., 1st Sess. (1983); H.R. 5529, 97th Cong., 2d Sess. (1982); H.R. 2349, 97th Cong., 1st Sess. (1981))."

Furthermore, as this Court has noted, "[t]he States, of course, have taken their own steps to prevent abusive districting practices. A number have adopted standards for redistricting, and measures designed to insulate the process from politics." *Vieth,* 541 U.S. at 277 fn.4. Indeed, "[e]ight states prohibit their redistricting bodies, most of which are commissions, from drawing state legislative districts in order to 'unduly' favor a candidate or political party; the same eight states do the same for congressional

districts. Arizona, California, Iowa, Idaho, and Montana ban considering an incumbent's home address when drawing district lines; many of the same states also limit the use of further political data like partisan registration or voting history." http://redistricting.lls.edu/where-state.php#political.

The voters in California and in Arizona have enacted such legislative measures. The two redistricting commissions are directed not to use political considerations and instead to apply other criteria in drawing districts. This approach is both pioneering and democratic, and far different than the criteria that might otherwise be applied by elected state representatives with ties to political parties. As discussed above, the federal structure of dual sovereignty "allows for more innovation and experimentation in government. . " (*Gregory*, 501 U.S. at 458.) The use of the initiative to accomplish these changes in the redistricting process is both legal and fitting.

II. USING INDEPENDENT COMMISSIONS TO DRAW CONGRESSIONAL DISTRICTS, MANDATED BY LAWS ENACTED BY STATE INITIATIVES, DOES NOT VIOLATE FEDERAL LAW

Turning to the specific question this Court has asked, whether the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts, the answer depends on the meaning of the

word "Legislature" in the Elections Clause, U.S. Const., art. I, § 4, cl. 1, and its requirement that congressional redistricting "shall be prescribed in each State by the Legislature thereof" and the words in federal law requiring a state to be redistricted "in the manner provided by the law thereof," 2 U.S.C. § 2a(c). The correct answer is that these provisions do not preclude the use of initiatives to enact the laws governing congressional redistricting because the electorate's power to adopt state law by initiative is coextensive with the lawmaking authority of the state elected representatives. The term "Legislature" refers to all bodies authorized to make state law, and includes the electorate when it exercises its power of initiative and referendum.

While no case law appears to address directly whether congressional redistricting may be the subject of an initiative,[7] the counterpart to the initiative

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[7] California's Attorney General did, however, directly opine on this precise issue more than half a century ago, and concluded that nothing in the federal Constitution or statutes precluded California using an initiative to adopt congressional redistricting. "Since, in California, the initiative is an exercise of lawmaking authority reserved to the people, a congressional districting law, like other exercises of the lawmaking power, may be proposed and enacted by means of an initiative." 51 Ops. Cal. Atty. Gen. 11, 14 (1951). The primary question addressed in that opinion was whether congressional redistricting was subject to referendum, and the opinion concluded that it was, relying upon *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565.

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power is the referendum power,[8] and congressional redistricting by state legislatures may clearly be the subject of a referendum. This precise issue was addressed in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), where the court determined that a congressional redistricting plan drawn by the state legislature was subject to referendum. The Court looked to the law of Ohio and found that in the Ohio Constitution, "the legislative power was expressly declared to be vested not only in the senate and house of

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But the opinion further considered the power of initiative and concluded that a congressional redstricting law could be enacted by initiative without violating federal law.

> [T]he electors' power to adopt initiative statutes is coextensive with the lawmaking authority of the Legislature. Article I, section 4 of the Federal Constitution delegates to the Legislature of each state the power to regulate the places and manner of electing congressmen. As we have seen, the delegation does not run to the Legislature as an agency separate from the people, but to the lawmaking authority of the state, to be exercised in the manner provided by the state's own organic law.

51 Ops. Cal. Atty. Gen. 11, 14.

Attorney General opinions construing state law are entitled to great weight. (*Ennabe v. Manosa*, 58 Cal.4th 697, 717 fn.14, 319 P.3d 201 (2014); *Lexin v. Superior Court*, 47 Cal.4th 1050, 1087 fn.17, 222 P.3d 214 (2010).)

[8] California reserves both the power of initiative and the power of referendum to the voters. "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Cal. Const., art. II, § 8(a). "The referendum is the power of the electors to approve or reject statutes or parts of statutes. . . " Cal. Const., art. II, § 9(a).

representatives of the state, constituting the general assembly, but in the people, in whom a right was reserved by way of referendum." *Id.*, at 566. Furthermore, it looked to the understanding of Congress in enacting the predecessor to 2 U.S.C. § 2a(c) and the language requiring that the redistricting should be made by a state "in the manner provided by the laws thereof," and held that these words encompass the whole of state law, whether enacted by the electorate or a legislative body. *Id.*, at 568. It concluded that while the Elections Clause grants congressional redistricting authority to the Legislature, where, as here, the state reserves legislative power to the people, the state's legislative power does not rest exclusively in the state legislature. See, also, *Hawke v. Smith,* 253 U.S. 230-231 (1920), where, referring to *Ohio ex rel. Davis v. Hildebrant,* the Court said: "[a]s shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional." The California Supreme Court has similarly recognized the right of the people to reject legislative redistricting plans through their reserved power of referendum. See *Assembly v. Deukmejian,* 30 Cal.3d 638, 652, 639 P.2d 939 (1982).

Additional support for the proposition that the use of the word "Legislature" in the Elections Code

does not mean that the redistricting power rests exclusively with a state's elected representatives is found in *Smiley v. Holm*, 285 U.S. 355 (1932), where this Court considered the effect of a governor's veto and rejected the argument that the word "Legislature" in the Elections Clause excluded the Governor's participation. As the Court explained, [w]herever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view." *Smiley* at 366. "As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.*, at 367.

In addition, the word "Legislature" cannot be limited to state legislative bodies to the exclusion of all other state entities, as state courts have also been held to have the power to draw redistricting plans. "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Scott v. Germano,* 381 U.S. 407, 409 (1920) (*per curiam*). The California Supreme Court has affirmed its jurisdiction to order special masters to draw redistricting plans where the Legislature fails to do so or the Governor vetoes the plans. See *Wilson v. Eu,* 54 Cal.3d 471, 473, 816 P.2d

1306 (1920); *Legislature v. Reinecke,* 10 Cal.3d 396, 400, 516 P.2d 6 (1973).[9]

As this Court stated in *Growe v. Emison,* 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier,* 420 U.S. 1, 27 (1975)), "[w]e say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature ***or other body***, rather than of a federal court." (Emphasis added.)

Because neither the Elections Clause nor any other provision of the federal Constitution or federal law defines what is meant by the term "Legislature" as used in the Elections Clause, and because the

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[9] As the *Reinecke* decision noted, the use of the Court and special masters has the advantage of avoiding partisanship in line drawing.

> The most frequently voiced objection to all plans recommended by the Legislature, including the reapportionment plan for the Senate that the Governor found tolerable, was that those plans were designed primarily to favor incumbents and to obtain partisan advantage for one or the other of the major political parties. It was evident that there was widespread public cynicism about the political process, and it was frequently stated that the Masters were in a singularly advantageous position unavailable to legislators, who cannot escape the inevitable force of self-interest. Many who appeared expressed the belief that any plans promulgated by the Court or by the Masters would be less incumbent-oriented or politically motivated than the plans recommended by the Legislature or others with special interests in reapportionment.

Reinecke, 10 Cal.3d at 409.

federal Constitution, with exceptions not applicable here, leaves the states free to determine for themselves their own legislative procedures and form of government, so long as it is a "republican form of government" (U.S. Const., art. IV, § 4), the decision of each state as to what constitutes its lawmaking body should be respected. Where, as in California and Arizona, both the people of the state and the elected state representatives may enact laws, both are properly considered the "Legislature," and should be considered so for purposes of the Elections Clause.

Similarly, as to the words in federal law requiring a state to be redistricted "in the manner provided by the law thereof," (2 U.S.C. § 2a(c)), "the law thereof" is not limited to laws enacted by the elected state representatives, but instead encompasses all state laws, including those enacted by initiative. So, where, as here, an initiative passed by the voters provides that an independent commission is responsible for establishing congressional districts, the actions of the commission in drawing congressional districts are carried out "in the manner provided by [state] law."

Moreover, it should be noted that the decision of California voters to create the California Redistricting Commission includes explicit provisions for the continued involvement of their elected state representatives. Legislative leaders have specified veto authority to remove applicants from the selection subpools. Cal. Gov't Code § 8252(c). Also, the California Legislature, working with the Commission, may amend the provisions of the initiative, subject to

statutory requirements. Cal. Gov't Code § 8251(c). Indeed, the California Legislature, at the request of CRC, has already enacted legislation amending certain provisions of the redistricting process. See Senate Bill No. 1096 (2010-2011), enacted as Cal. Stats. 2011, Ch. 271, making amendments to improve the operation of the redistricting process. And, finally, the California Senate must participate in any removal of a Commissioner. Cal. Gov't Code § 8252.5(a). So, elected state representatives continue to play a role in the line-drawing process.

This decision by the voters in California and Arizona to revise the redistricting process to create independent redistricting commissions, to eliminate partisanship, and to base district lines on established criteria may be innovative, but it should be respected. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). As this Court explained in its unanimous opinion in *Bond v. United States*, 564 U.S. ___, ___, 131 S.Ct. 2355, 2364 (2011), this distribution of power protects "the integrity, dignity, and residual sovereignty of the States."

> Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically

> granted to the Federal Government are reserved to the States or citizens. Admit. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 564 U.S. ___, ___, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011).

Shelby County v. Holder, ___ U.S. ___, ___, 133 S.Ct. 2612, 2623 (2013).

California and Arizona, exercising their sovereign power, have first determined, in their state constitutions, that legislation may be enacted either by vote of the state's elected representatives or by vote of the people pursuant to their power of initiative. Then, in each state, legislation enacted by the voters' power of initiative has established a redistricting commission, the voters having determined that the needs of their states were best served by a redistricting process that rules out political gerrymander. As explained in *Reinecke*, 10 Cal.3d at 417, "the objective of reapportionment should not be the political survival or comfort of those already in office." The voters of Arizona and California have voiced this same concern in creating independent commissions to accomplish redistricting, and their determinations should be respected.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed. This Court should affirm that although Arizona, through the initiative process and vote of its citizens, has departed from traditional redistricting practices, this does not violate federal law. Nothing in federal law precludes Arizona, or California from enacting, by initiative, an innovative system that provides for redistricting to be carried out by independent commissions, thus removing partisanship from that process yet still ensuring that districts satisfy federal law.

Respectfully submitted,

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January 22, 2015

AMICUS CURIAE BRIEF

No. 13-1314

IN THE

Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF THE CAMPAIGN LEGAL CENTER, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, THE AMERICAN CIVIL LIBERTIES UNION, COMMON CAUSE, AND DEMOCRACY 21 AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae The Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. The CLC has served as *amicus curiae* or counsel in voting rights and redistricting cases in this Court, including *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), *Bartlett v. Strickland*, 556 U.S. 1 (2009), and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), among others. The CLC has a demonstrated interest in voting rights and redistricting law.

Amicus curiae the League of Women Voters of the United States (the League) is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800 communities and in every state, with more than 150,000 members and supporters nationwide. The League

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

promotes an open governmental system that is representative, accountable, and responsive and that ensures opportunities for citizen participation in government decision-making. To further this goal, the League has been a leader in seeking reform of the redistricting process at the state, local, and federal levels for more than three decades.

Amicus curiae the American Civil Liberties Union Foundation (ACLU) is a nonprofit, nonpartisan organization with 500,000 members dedicated to the principles of liberty and equality enshrined in the Constitution and our nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court in numerous cases involving electoral democracy, including earlier cases addressing the issue of excessive partisan gerrymandering

Amicus curiae Common Cause is a nonpartisan, nonprofit citizens' organization dedicated to ensuring open, accountable, and effective government. Common Cause works to strengthen public participation in the political process and to ensure that process serves the public interest. To that end, Common Cause has pursued redistricting reform for several decades in states including Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maryland, Minnesota, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, Wisconsin, Utah, and others. Specifically, Common Cause led the coalition that successfully pushed for the ballot initiative creating the Arizona Independent Redistricting Commission. Common Cause was also a

sponsor of two successful ballot initiatives to amend the Florida Constitution to prohibit partisan gerrymandering. Common Cause led efforts to reform California's redistricting process by drafting, serving as a proponent of, and defending Proposition 11, which created the Citizens Redistricting Commission, and Proposition 20, which expanded the Commission's responsibility to draw congressional districts.

Amicus curiae Democracy 21 is a nonprofit, nonpartisan policy organization that works to strengthen democracy. Democracy 21 has participated as counsel or *amicus curiae* in a number of cases before this Court involving the constitutionality of the campaign finance laws and other reform laws. The organization works to ensure the integrity of government decisions and to provide for fair and honest elections. It supports campaign finance and other political reforms, conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance and other political reform laws, and engages in efforts to help ensure that these laws are properly interpreted and enforced.

SUMMARY OF ARGUMENT

It has been just over fifty years since this Court first remarked that the goal of redistricting is to establish "fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964). Today, however, many state legislators appear to operate on the assumption that the goal of redistricting is to gain maximum partisan advantage for the political party that controls the redistricting

process. Partisan gerrymandering has reached unprecedented levels, subverting the federal electoral system envisioned by the Constitution. The harms of partisan gerrymandering have been well documented: the practice undermines the concept of majority rule, reduces the competitiveness of elections, and contributes to the political polarization that feeds gridlock.

Despite these harms, a practicable standard for adjudicating partisan gerrymandering claims has remained elusive, and the judiciary has thus far been unable to rein in this practice. As a result, other solutions are currently being explored by citizens seeking to enforce the guarantee in Article I, Section 2 of the Constitution that their Members of Congress actually be "chosen . . . by the People of the several States," U.S. Const. art. I, § 2, rather than predetermined through gerrymandering by state legislatures. Most prominently, voters in several states, including Arizona, have used the initiative process to require redistricting by independent commissions so as to avoid partisan influence and incumbency protection.

These independent redistricting commissions are a valuable result of direct democracy, which allows the people of an individual state to avail themselves of their inherent lawmaking power and bypass self-interested politicians in order to secure the fair elections to which they are constitutionally entitled. Citizen-driven structural reforms such as Arizona's independent redistricting commission are one of the few remaining alternatives for addressing partisan gerrymandering

given that courts have, to this point, been unable to fashion a judicially manageable standard to curb gerrymandering, and that congressional action is highly unlikely.

A reading of the Elections Clause that would preclude the "People of the several States" from reining in the unconstitutional practice of extreme partisan gerrymandering in elections for the House of Representatives would be fundamentally inconsistent with the Constitution's commitment to a system of government for "We the People of the United States." *Amici* therefore respectfully urge the Court to uphold the decision of the district court finding that the Elections Clause does not preclude redistricting by an independent commission created by the People of Arizona.

ARGUMENT

I. Partisan Gerrymandering Poses A Threat To Our Democracy.

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), this Court made clear that it believes extreme partisan gerrymandering is a significant problem that amounts to disruption of our constitutional order. The problem has only worsened in the decade since *Vieth*. Indeed, "the problem of gerrymandering has never been worse in modern American history."[2] As the problem of

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[2] Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap* 5, (Univ. of Chi. Public Law and Legal Theory Working Paper No. 493, 2014),

gerrymandering worsens, its distortive effect on our electoral system grows. Severe partisan gerrymandering has been shown to undermine representative democracy, reduce the competitiveness of elections, and contribute to political polarization.

A. The Court In *Vieth v. Jubelirer* Unanimously Agreed That Extreme Partisan Gerrymandering Is Unconstitutional And Harmful.

Judicial involvement with partisan gerrymandering claims began nearly thirty years ago with the case of *Davis v. Bandemer*, 478 U.S. 109 (1986), in which this Court held that partisan gerrymandering presents a justiciable case or controversy. *Id.* at 143. Eighteen years later, the Court revisited the issue in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). While the Court in *Vieth* disagreed on the justiciability of partisan gerrymandering claims, the Court was unanimous in agreeing that "excessive partisanship in redistricting is unconstitutional."[3]

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457468 (82 U. Chi. L. Rev. (forthcoming 2015)).

[3] Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 782 (2005) ("To be sure, *Vieth* did advance the ball in one critical respect: For the first time, all nine Justices agreed that excessive partisanship in redistricting is unconstitutional."); *see Vieth*, 541 U.S. at 292 (plurality opinion) ("We do not disagree with [the] judgment" that "severe partisan gerrymanders [are incompatible] with democratic principles"); *id.* at 314-17 (Kennedy J., concurring) (concluding that partisan gerrymandering raises First Amendment concerns); *id.* at 317-18 (Stevens, J., dissenting)

The Court was likewise unanimous in agreeing that extreme partisan gerrymandering is harmful to American democracy. The four justices in the plurality acknowledged, for example, that excessive partisanship in redistricting offends the Constitution—and is therefore "*un*lawful"—and also that the "*excessive* injection of politics" into the redistricting process is fundamentally "[incompatible] with democratic principles." *Vieth*, 541 U.S. at 292-93. In his concurrence, Justice Kennedy noted that "[a]llegations of unconstitutional bias in apportionment are most serious claims," explaining that severe partisan gerrymanders impose burdens "on the representational rights of voters and parties." *Id.* at 311-13 (Kennedy, J., concurring). Justice Kennedy applauded the plurality for acknowledging that "partisan gerrymandering that disfavors one party" is impermissible. *Id.* at 316; *see also id.* (giving examples of both an "egregious" and a "more subtle" partisan gerrymander, and concluding that "each is culpable"). He further lamented that "[w]hether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes

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("The concept of equal justice under law requires the State to govern impartially[, and] partisan gerrymanders that are devoid of any rational justification . . . cannot be said to [be] impartial[]."); *id.* at 343 (Souter, J., dissenting) (explaining that "the guarantee of equal protection condemns [some forms of partisan gerrymandering] as a denial of substantial equality"); *id.* at 355 (Breyer, J., dissenting) ("The use of purely political considerations in drawing district boundaries is not a 'necessary evil' that . . . the Constitution inevitably must tolerate.").

to apportionment: 'We are in the business of rigging elections.'" *Id.* at 317 (citation omitted).

The various dissenters in *Vieth* similarly expressed concern with the harms of partisan gerrymandering. Justice Stevens' dissent observed that the "danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all." *Id.* at 331 (Stevens, J., dissenting). Justice Souter, joined by Justice Ginsburg, asserted that "the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine." *Id.* at 345 (Souter, J., dissenting). Similarly, Justice Breyer's dissent recognized that "purely political 'gerrymandering' . . . threaten[s] serious democratic harm" and "violates basic democratic norms." *Id.* at 355, 361 (Breyer, J., dissenting). Thus, the *Vieth* Court expressed deep concern about partisan excesses in redistricting, both as a matter of constitutional law and with respect to the vitality of American democracy.

B. Partisan Gerrymandering Thwarts Majority Rule, Makes Elections Less Competitive, And Heightens Political Polarization, Thereby Undermining Democratic Accountability.

The *Vieth* Court's unanimous recognition of gerrymandering's subversion of fundamental democratic values rests upon a sound empirical basis. As the scholarly literature emphasizes, "the quintessential injury inflicted by gerrymandering" is

that gerrymandered district configurations often fail to reflect the actual partisan divide within the electorate, resulting in legislatures whose composition diverges from the will of a majority of voters.[4] This practice "undermine[s] citizen participation and republican self governance."[5]

Partisan gerrymandering's interference with majority rule is borne out in the statistics on partisan bias—a measurement of "the divergence in the share of seats that each party would win given the same share of the statewide vote."[6] Scholars have determined that when a party is in full control of a state's government, the redistricting plans it enacts "tend to award it about 6% more seats than if the opposing party had been

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[4] Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 Colum. L. Rev. 283, 286 (2014) (noting that "the most glaring problem with gerrymandering . . . is the partisan havoc that it may wreak"); *see also* G. Alan Tarr & Robert F. Williams, *Eighteenth Annual Issue on State Constitutional Law: Introduction*, 37 Rutgers L.J. 877, 878 (2006) ("Partisan gerrymandering ensures that the make-up of legislatures will fail to reflect fairly the partisan division within the electorate."); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103, 116 (2000) ("Partisan gerrymandering is designed to entrench a particular political faction against effective political challenge—sometimes even to give a political minority effective control. That is in obvious tension with the values of Republicanism.").

[5] Christopher J. Roederer, *The Noble Business of "Incumbantocracy:" A Response to the Sordid Business of Democracy*, 34 Ohio N.U. L. Rev. 373, 389 (2008).

[6] Stephanopoulos, *Elections and Alignment*, *supra* note 4, at 347.

responsible for redistricting."[7] And one recent analysis showed that "the typical 2012 congressional plan featured an absolute bias of about 11%," the highest score since 1966.[8]

Both parties have engaged in this undemocratic practice. A study by the Brennan Center for Justice showed that in 2012, in states where Republicans controlled the redistricting process, their candidates won roughly 53 percent of the vote but 72 percent of the seats.[9] In states where Democrats controlled the process, their candidates won about 56 percent of the vote and 71 percent of the seats.[10] For example, "Democratic Congressional candidates won nearly half the votes in Virginia but only 27 percent of its seats, and 48 percent of the vote in Ohio but only a quarter of its seats."[11] Meanwhile, "[i]n Illinois, where Democrats drew the maps, Republican Congressional candidates won 45 percent of the popular vote but only a third of

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[7] *Id.* at 349.

[8] *Id.* at 348.

[9] Sundeep Iyer, Brennan Ctr. For Justice, *Redistricting and Congressional Control Following the 2012 Election* (Nov. 28, 2012), http://www.brennancenter.org/analysis/redistricting-and-congressional-control-following-2012-election.

[10] *Id.*

[11] Griff Palmer & Michael Cooper, *How Maps Helped Republicans Keep an Edge in the House*, N.Y. Times, Dec. 14, 2012, http://www.nytimes.com/2012/12/15/us/politics/redistricting-helped-republicans-hold-onto-congress.html.

the House seats. And in Maryland, Republicans won 35 percent of the votes but just 13 percent of the seats."[12] Gerrymandering thus thwarts the will of voting majorities, "arrest[ing] the House's dynamic process" and "creat[ing] undemocratic slippage between the people and their government."[13] In this way, partisan gerrymandering is turning the House "into something sclerotic and skewed,"[14] rather than an institution responsive to and aligned with the actual preferences of the voters.[15]

Partisan gerrymandering likewise thwarts the will of the majority by reducing electoral competitiveness. Indeed, the entire strategy of gerrymandering is "to

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[12] *Id.*

[13] Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L. Rev. 253, 260-61 (2006).

[14] Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Election L.J. 179, 215 (2003).

[15] In 2014, Republicans won 52 percent of the popular vote, but captured 57 percent of the seats in the House. David Wasserman, FiveThirtyEight, *Why House Republicans Did Even Better Than They Expected* (Nov. 18, 2014, 11:50 AM), http://fivethirtyeight.com/features/why-house-republicans-did-even-better-than-they-expected/. In 2012, Republicans won 48 percent of the popular vote, but captured 55 percent of the seats in the House, making 2012 "one of a handful of elections in the last century where the party that won the popular vote for Congress did not win control of the House." Palmer & Cooper, *supra* note 11.

make virtually every district noncompetitive."[16] The decline in competitive districts results in significant part from the practice of "packing," in which self-interested politicians draw districts filled with sympathetic voters, creating safe districts dominated by voters loyal to one party's candidates. Often, incumbents excise competitors and divide up the constituencies of those competitors. To be sure, the rise in safe seats can also be attributed partly to the geographic distribution of the parties' supporters.[17] But it is one thing for elections to become less competitive due solely to natural geographic self-sorting, and entirely another for legislators to

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[16] Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 483 (2004) (noting that the "strategy [of gerrymandering] . . . aims to make virtually every district noncompetitive"); *see also* Stephanopoulos, *Elections and Alignment*, *supra* note 4, at 343-44 (noting that a "key harm" of gerrymandering "is the lack of competition that ensues when incumbents are placed in overly safe districts"); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 600 (2002) (defining gerrymandering as "[a] constriction of the competitive processes by which voters can express choice").

[17] *See* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 QJ. Pol. Sci. 239, 240 (2013) (referencing "unintentional gerrymandering, whereby one party's voters are more geographically clustered than those of the opposing party due to residential patterns and human geography."); Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 Am. J. Pol. Sci. 666, 678 (2009) (pointing to "increased geographical sorting on political and social attitudes").

purposefully make elections less competitive for themselves.

Overall, competitiveness in House elections has been steadily declining since World War II.[18] One recent study found that partisan gerrymandering accounts for much of that decline, concluding that the 1980, 1990, and 2000 redistricting cycles accounted in the aggregate for 83% of the decline in competitive House seats since 1980.[19] This lack of competition contrasts greatly with non-gerrymandered Senate and gubernatorial races. For example, while fewer than 10% of House elections were competitive in 2002, nearly 50% of Senate and gubernatorial elections were competitive.[20] And this trend has continued; a recent study demonstrated that after the 2010 redistricting cycle, there were 15 fewer competitive districts than there were following the 2000 redistricting cycle.[21] Thus, "[o]ver the past decade, partisan gerrymandering has made competitive legislative elections a rarity."[22]

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[18] *See* Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Pol. 75, 75-76 (2006).

[19] McCarty, *supra* note 17, at 673.

[20] Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 63-64 (2004).

[21] Fair Vote, Ctr. for Voting & Democracy, *Redistricting 2012: The Worst Congressional Map Ever?* (Oct. 2012).

[22] Alex J. Whitman, *Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 Emory L.J. 211, 212 (2009).

The increase in noncompetitive elections has had ramifications beyond simply the constriction of voter choice. First, the lack of competition contributes to the unrepresentative "hyperpolarized political parties" that have emerged in recent years.[23] Indeed, at least "a portion of the polarization we are observing in Congress is being artificially generated by the mapmakers responsible for drawing district boundaries at the state level."[24]

Second, the overwhelmingly safe seats created by partisan gerrymandering encourage ideological candidates who listen only to the voices of the party's base, especially when primary elections all but decide the ultimate winner.[25] Safe seats artificially entrench incumbents and can skew their positions, making them unresponsive to the political center because their electoral prospects do not depend on support from centrist voters or members of the opposing party.[26] In

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[23] Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 Yale L.J. 804, 818 (2014).

[24] Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 Am. Pol. Res. 878, 899 (2007) (finding evidence that "districts that have undergone significant change following redistricting have become more polarized, thus contributing to higher levels of polarization among legislators representing those districts").

[25] *See* Jeffrey Toobin, *The Great Election Grab*, New Yorker, at 63 (Dec. 8, 2003) (quoting Samuel Issacharoff).

[26] *See id.*

those ways, partisan gerrymandering can encourage extreme partisanship and discourage deliberative compromise with members of opposing political parties, producing policy gridlock that impedes the effective functioning of Congress.[27]

Third, the decline in competitive elections has also led to an increase in voter apathy and a concomitant decline in voter participation. A key part of the success of a democracy is the widespread belief in the fairness of elections. Competitive elections have been found to "have positive effects that endure for at least a year beyond the campaign season, reinforcing the idea that political competition plays a robust role in American representative democracy."[28] But this pattern of representatives choosing their voters rather than voters choosing their representatives reduces voters' faith in government, creating public disaffection that

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[27] *See* David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 Vill. L. Rev. 57, 57-58 (2006) (explaining that "partisanship may now pose serious problems for the effective functioning of basic American political institutions such as Congress"). However, not all scholars agree that partisan gerrymandering has increased political polarization. *See, e.g.*, Richard H. Pildes, *Why The Center Does Not Hold: The Causes Of Hyperpolarized Democracy In America*, 99 Calif. L. Rev. 273, 315 (2011) (concluding that, while "[t]here is no doubt polarization has increased dramatically since the 1970s, and that districted elections are less competitive," gerrymandering "does not seem to be a major cause").

[28] Heather K. Evans et al., *The Enduring Effects Of Competitive Elections*, 24 J. Elec. Pub. Op. & Parties 455, 455 (2014).

"can discourage potential voters and reduce political participation."[29]

In these ways, extreme partisan gerrymandering threatens "the prime guarantor of democratic legitimacy": accountability to the electorate.[30] The House of Representatives was meant to be a "numerous and changeable body" whose membership would reflect the shifting popular will. *See* The Federalist No. 63, at 383 (James Madison) (Clinton Rossiter ed., 1961). Elected officials remain faithful to voter preferences and responsive to shifts in those preferences so long as they are held accountable by the voters at election time. But partisan gerrymandering "skews the incentive structures operating to ensure the accountability of elected representatives to shifts in the preferences of the electorate."[31] As a result, democratic legitimacy is compromised.

In sum, the democratic harms caused by partisan gerrymandering, as recognized by the *Vieth* Court and confirmed by the scholarly literature, undermine the functioning of American democracy.

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[29] Tarr & Williams, *supra* note 4, at 878.

[30] Issacharoff, *Political Cartels*, *supra* note 16, at 615.

[31] *Id.* at 605-06.

II. Without Judicial Recourse, Partisan Gerrymandering Can Be Prevented By Allowing The People To Exercise Their Lawmaking Power Over The Redistricting Process.

As discussed above, legislators have continuously and increasingly demonstrated their inability to resist the temptation of partisan gerrymandering. Absent a miraculous sea change in the exercise of political self-restraint on behalf of our nation's elected officials, then, the problem of partisan gerrymandering can best be ameliorated in one of two ways: through judicial intervention or by rebalancing the legislative role in redistricting. The first approach, which would require judicial enforcement of partisan gerrymandering claims, remains theoretical at this point due to the lack of judicially manageable standards. Therefore, the second approach, which has been adopted by the voters of Arizona, is one of the best remaining alternatives. To read the Elections Clause in a manner that would preclude the "People of the several States" from exercising their sovereign power to assert control over their choice of congressional representatives would flout the very structure of our constitutional system.

A. Until The Court Provides A Standard For Judicial Restraint Of Extreme Partisan Gerrymandering, Lower Courts Will Be Unable To Curb It.

The judicial branch is presently unable to provide a check on partisan gerrymandering due to this Court's difficulty in identifying a judicially manageable standard to adjudicate such claims. The Court's

inability to agree on such a standard in *Vieth* left lower courts with little guidance on how to adjudicate the claims that the Court declared justiciable. *See Vieth*, 541 U.S. at 307-08, 317 (Kennedy, J., concurring) (noting that the Court had "no basis on which to define clear, manageable, and politically neutral standards" and rejecting the dissenters' proposed standards). When the issue next arose in *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399 (2006), the Court did not revisit the conclusion that partisan gerrymandering claims are justiciable, *see id.* at 414 (opinion of the Court), but it again declined to promulgate a standard for deciding them, *see id.* at 420 (opinion of Kennedy, J.) (concluding that "the absence of any other workable test for judging partisan gerrymanders" compelled the rejection of the claim).[32]

The *Vieth* and *LULAC* decisions "place district courts in the untenable position of evaluating political gerrymandering claims without any definitive

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[32] Judicial enforcement has thus far been limited to the circumstance where gerrymandering is accomplished by systematically overpopulating districts dominated by one party and underpopulating districts dominated by the other, thereby violating the equipopulation requirement of the Equal Protection Clause. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1328-31, 1338, 1352 (N.D. Ga. 2004) (concluding that population deviations in a state legislative apportionment plan were not supported by "any legitimate, consistently-applied state interests," but rather were the result of regionalism and "an obviously purposeful attempt to unseat as many [Republican incumbents] as possible" and striking down the plan as violating the one-person, one-vote principle), *summarily aff'd*, 542 U.S. 947 (2004).

standards." *Radogno v. Ill. State Bd. of Elections* (*Radogno I*), No. 11-cv-04884, 2011 WL 5025251, at *4 (N.D. Ill. Oct. 21, 2011). The absence of clear standards to apply to these claims has made it extraordinarily difficult for lower courts to prevent states from pursuing excessive partisanship in redistricting. Indeed, in the decade that has passed since *Vieth*, lower courts have repeatedly been put in the position of asking: "How much [partisanship] is too much, and why?" *Radogno v. Ill. State Bd. of Elections* (*Radogno II*), No. 11-cv-4884, 2011 WL 5868225, at *2 (N.D. Ill. Nov. 22, 2011), *summarily aff'd*, 133 S. Ct. 103 (2012).

With no clear standards from this Court by which to measure partisan gerrymandering claims, lower courts have been unable to stop the practice, even as they recognize that it is wrong. Instead, courts across the country have, with some reluctance, consistently rejected such claims.[33] Given this landscape, citizens

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[33] *See, e.g.*, *Benisek v. Mack*, 11 F. Supp. 3d 516, 525 (D. Md. 2014) (rejecting partisan gerrymandering claim because "the standard Plaintiffs propose is, in substance, markedly similar to tests that have already been rejected by the courts"), *summarily aff'd*, 584 F. App'x 140 (4th Cir. 2014) (per curiam); *Perez v. Perry*, 26 F. Supp. 3d 612, 623 (W.D. Tex. 2014) (rejecting partisan gerrymandering claim after the plaintiffs "contend[ed] that no standard [was] necessary . . . because Defendants have admitted to partisan gerrymandering" in addition to proposing tests rejected in *Vieth*); *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1296 (M.D. Ala. 2013) (questioning how the court "could 'allow a claim to go forward that no one understands,'" and for which plaintiffs "'don't even know what evidence [they can] marshal to either support it or reject it'" (citation omitted); *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d

have understandably looked beyond the courts and toward other solutions in order to ameliorate the harm caused by unconstitutional partisan gerrymandering.

840, 853-54 (E.D. Wis. 2012) (rejecting partisan gerrymandering claim because of the plaintiff's "failure to offer a workable standard"); *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 904 (D. Md. 2011) (concluding that "[a]bsent a clear standard to apply," it had no choice but to reject the plaintiffs' claim), *summarily aff'd*, 133 S. Ct. 29 (2012); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 567, 579 (N.D. Ill. 2011) (rejecting partisan gerrymandering claim because plaintiff proposed a standard "not so dissimilar from the effects test rejected in *Vieth*"); *Radogno II*, 2011 WL 5868225, at *2 (rejecting partisan gerrymandering claim because such claims "are currently 'unsolvable' based on the absence of any workable standard for addressing them"); *League of Women Voters v. Quinn*, No. 11-cv-5569, 2011 WL 5143044, at *1-4 (N.D. Ill. Oct. 28, 2011) (rejecting a partisan gerrymandering claim based on a First Amendment standard), *summarily aff'd*, 132 S. Ct. 2430 (2012); *Radogno I*, 2011 WL 5025251, at *6 (rejecting partisan gerrymandering claim because plaintiffs did not state "a workable standard of fairness by which to assess that claim"); *Perez v. Texas*, No. 11-CA-0360, 2011 WL 9160142, at *11 (W.D. Tex. Sept. 2, 2011) (rejecting a partisan gerrymandering claim because the plaintiffs did not "identif[y] a reliable standard by which to measure the redistricting plan's alleged burden on their representational rights"); *Henderson v. Perry*, 399 F. Supp. 2d 756, 770 (E.D. Tex. 2005) (rejecting partisan gerrymandering claim because "the plaintiffs' contentions . are conspicuous for want of any measure of substantive fairness"); *Pearson v. Koster*, 359 S.W.3d 35, 42 (Mo. 2012) (rejecting a partisan gerrymandering claim "[i]n light of the Supreme Court's inability to state a clear standard"); *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 390 (W. Va. 2012) (rejecting a partisan gerrymandering claim because of the lack of "any authoritative standard by which to definitively judge such matters").

B. Partisan Gerrymandering Can Be Curtailed By Allowing Citizens To Exercise Their Sovereign Power Over The Redistricting Process.

When the citizens of Arizona acted to end partisan gerrymandering in their state, they acted in a manner fully consistent with our constitutional structure, which derives its authority from "We the People." U.S. Const. pmbl.; *see also* The Declaration of Independence para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed[.]").[34] The original constitutional text included numerous structural elements to give effect to the popular will,[35] and of the seventeen amendments adopted after the Bill of Rights, twelve deal with the democratic process and the government's ongoing accountability to the People.[36] As this Court has

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[34] John Hart Ely, *Democracy and Distrust* 87 (1980) (noting that at its core, the Constitution expresses "overwhelming[] concern[] . . . with ensuring broad participation in the processes and distributions of government").

[35] *See, e.g.*, U.S. Const. art. IV, § 4 (guaranteeing states a republican form of government); art. I, § 2, cl. 3 (providing for decennial enumeration and establishing minimum population of House districts); *id.* art. 1, § 2, cl. 4 (requiring House vacancies to be filled by elections, not appointments).

[36] The Fourteenth Amendment establishes national citizenship, requires states to provide equal protection of the laws (including voting districts of equal population), and makes states' representation in Congress dependent on their granting suffrage to newly freed slaves. The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments

explained, quoting Alexander Hamilton, "[t]he true principle of a republic is, that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (quoting 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876)). Indeed, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (plurality opinion).

It would thus be perverse to interpret the term "Legislature" in the Elections Clause so as to exclude lawmaking by the People, particularly where such lawmaking is intended to secure the constitutional right guaranteed in Article I, Section 2 of the Constitution that Members of Congress actually be "chosen . . . by the People of the several States." U.S. Const. art. I, § 2. The People of Arizona have exercised their direct sovereign authority, granted to them by their own state constitution, to end the practice of partisan gerrymandering in their state for the election of members of the House of Representatives. In so doing, the People of Arizona have specifically sought to

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implement equal universal suffrage by banning voting discrimination on the basis of race, sex, wealth, or youth; providing for direct popular election of Senators; and permitting residents of the District of Columbia to participate in presidential elections. The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth amendments provide for separate elections of the President and Vice-President, limit a lame duck President's term, impose a two-term limit on the Presidency, and provide for orderly succession in times of Presidential disability. The Twenty-Seventh amendment regulates Congressional self-interest by forbidding Members from raising their own pay.

restore the Framers' vision of the House as a fluid and "changeable body"[37] by making the specter of frequent House turnover an actual possibility. The House is, of course, the governing body that was envisioned by the Framers to be most accountable to the People.[38]

The term "Legislature" in the Elections Clause should not be read so narrowly that it would forbid the use of one of a state's most basic methods of lawmaking:

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[37] *The Federalist* No. 63, at 383 (James Madison) (noting that with its potential to fully turn over every two years, the House was meant to be a "numerous and changeable body" whose membership would reflect shifting popular will). In fact, Madison sought to persuade doubters that two years was not *too long* a period for the people to wait to replace their representatives in the House. *See The Federalist* No. 52, at 327 (James Madison) ("[I]t is particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectively secured."); *The Federalist* No. 53, at 330 (James Madison) ("I shall here, perhaps, be reminded of a current observation, 'that where annual elections end, tyranny begins.'"). The Framers thought that Representatives must face the prospect of defeat frequently, lest they forget the source of their authority. *See The Federalist* No. 57, at 352 (James Madison) ("[T]he House . . . is so constituted as to support in the members an habitual recollection of their dependence on the people.").

[38] Of the various governing bodies established by the original Constitution, the House of Representatives was intended to remain most closely answerable to the People. *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 Nw. U. L. Rev. 500, 515-16 (1997) (noting that the House was "the Eighteenth Century equivalent of government by poll").

lawmaking by vote of the People to remedy fundamental structural problems with the democratic system. In engaging in sovereign lawmaking, the People of Arizona have come up with a fundamentally democratic solution to the anti-democratic nature of partisan gerrymandering, which allows self-interested state legislators to skew unfairly the outcome of elections and debases the democratic process itself by "burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

Ordinary citizens have a key role to play in addressing the serious challenge partisan gerrymandering poses to our democratic processes. The Constitution envisions that "[s]erious complex legal change is often made in the context of a national conversation involving . . . legislators, judges, and many ordinary citizens whose lives [are affected]."[39] Partisan gerrymandering warrants, if not demands, such a broad-based conversation because of its capacity to distort our democratic ideals. Some state legislators have attempted various methods of partially addressing the problem, *see Vieth*, 541 U.S. at 277 n.4 (plurality opinion) (noting that "[t]he States, of course, have taken their own steps to prevent abusive districting practices" by "adopt[ing] standards for redistricting, and measures designed to insulate the

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[39] Stephen Breyer, *Active Liberty* 70-71 (2005).

process from politics"),[40] and Justices of this Court have been engaged with this conversation for decades, *see infra* Part I.

The Elections Clause should not be used as a sword to cut ordinary citizens out of this crucial and ongoing conversation, in which citizens engage in lawmaking so as to cure structural deficiencies in our system of government. *Cf. Schuette v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623, 1650 (2014) (Breyer, J., concurring) (explaining that "the 'Constitution creates a democratic political system through which the people themselves must together find answers' to disagreements of this kind" (citation omitted)); *NLRB v. Canning*, 134 S. Ct. 2550, 2577 (2014) (noting that the "constitutional structure" "foresees resolution not only through judicial interpretation and compromise among the branches but also by the ballot box").[41]

Indeed, "[t]he essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting). Thus, when addressing structural reform of governmental institutions of the

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[40] *See also* Brief for *Amicus Curiae* National Conference of State Legislatures in Support of Appellant at 3-13.

[41] *See also* Ely, *Democracy and Distrust*, *supra* note 32, at 76 ("[I]t is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open.").

sort at issue here, lawmaking by the People serves as a helpful reminder to legislatures that they are dutiful agents of the People, and to the People themselves of their ultimate responsibility to ensure that government is properly functioning on their behalf.

The exercise in popular sovereignty by the voters of Arizona also fully complies with federal statutory law. Congress has expressly directed that a state's redistricting process be carried out "in the manner provided by the law thereof." 2 U.S.C. § 2a(c). In placing authority for redistricting with the lawmaking processes of each state rather than with the state legislature exclusively, Congress exercised its power under the Elections Clause to direct the manner in which the election of federal representatives should take place, as was envisioned by the Clause.[42] And "there is no compelling reason not to read Elections Clause legislation simply to mean what it says." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013); *see id.* at 2253 (holding that congressional authority under the Elections Clause

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[42] Indeed, in 2 U.S.C. § 2a(c), Congress lays out the manner in which the election of federal representatives should occur in each State—at large, by districts, or by a combination thereof—and in so doing, directs that representatives should be elected in a manner "prescribed by the law of such State." 2 U.S.C. § 2a(c)(1)-(5). This is appropriate because the Elections Clause grants Congress "a general supervisory power over the whole subject" of federal elections. *Ex parte Siebold*, 100 U.S. 371, 387 (1879). By recognizing that the laws of a state are not the same as the legislature of the state, Congress has empowered the people of the state of Arizona to address excessive partisan gerrymandering.

should be broadly interpreted). The Arizona Constitution empowers the "people" to "propose laws and amendments to the constitution" by initiative and referendum. Ariz. Const. art. IV, part 1, § 1. And that is precisely what they did in this case.

Where, as here, the voters of Arizona have engaged in lawmaking as authorized under their state constitution in order to reform the redistricting process, "direct democracy is playing precisely the role that it should: . . . check[ing] dysfunctional government."[43] It is hard to identify a more appropriate "exercise of the[] [people's] democratic power" than that of "us[ing] the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters," *Schuette*, 134 S. Ct. at 1636, especially as it pertains to their concerns about the electoral process.

Finally, the exercise of direct democracy reflected in the creation of Arizona's independent commission is an important contribution to a "national dialogue," *Schuette*, 134 S. Ct. at 1630-31, between the people of the various states, operating as laboratories of democracy, regarding how best to structure the redistricting process and end partisan gerrymandering. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from

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[43] Note, *Judicial Approaches to Direct Democracy*, 118 Harv. L. Rev. 2748, 2764-65 (2005).

clear.").[44] State legislators should not be allowed to close the laboratory doors to the very people who elected them, and this Court should not interpret the Elections Clause in a way that furthers the undemocratic practice of extreme partisan gerrymandering and ends this important conversation.

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[44] *See also* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1812 (2012) (describing the Arizona and California commissions as "the natural experiments we can learn the most from because they collectively embody elements of almost every redistricting reform idea ever proposed"). Citizens of other states have also contributed to the conversation. For example, Florida voters passed a constitutional amendment that prohibited the Florida legislature from favoring or disfavoring a political party or incumbent when drawing congressional maps. *See Brown v. Sec'y of Fla.*, 668 F.3d 1271, 1272-73 (11th Cir. 2012) (upholding the amendment and reasoning that "the Florida voters' act of lawmaking according to the state's expressly enumerated lawmaking process is fully consistent with the commands of the federal Constitution's Elections Clause"). Other states have employed redistricting commissions that vary in their independence from the legislature. For example, Idaho and Washington have each tasked politically balanced independent commissions with final authority to draw congressional districts, while Hawaii and New Jersey use commissions to draw congressional districts but allow politicians to serve on those commissions. Other states use backup commissions to draw congressional maps if legislators are unable to agree on a redistricting plan by a certain date, and still others utilize advisory commissions to assist legislators with the redistricting process. *See* Justin Levitt, *Who Draws The Lines?*, All About Redistricting, Loyola Law School, http://redistricting.lls.edu/who.php (last visited Jan. 11, 2015).

CONCLUSION

For the foregoing reasons, the judgment of the District Court for the District of Arizona should be affirmed.

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January 23, 2015

AMICUS CURIAE BRIEF

No. 13-1314

In the Supreme Court of the United States

ARIZONA STATE LEGISLATURE

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF COOLIDGE-REAGAN FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Coolidge-Reagan Foundation works to promote free and fair elections at all levels and staunchly advocates the enforcement of constitutional rights and other constraints on federal and state authority.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Elections Clause of the U.S. Constitution provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . " U.S. Const. art. I. § 4, cl. 1. This provision grants state legislatures the authority to "provide a complete code" for federal elections, *Smiley v. Holm*, 285 U.S. 355, 366 (1932), including the power to draw congressional districts.

This case involves a double violation of the Elections Clause. Procedurally, the amendment to the Arizona Constitution that stripped the state legislature of its authority over redistricting and created the Arizona Independent Redistricting Commission ("IRC"), *see* ARIZ. CONST. art. IV, pt. 2, § 1 (the "IRC Amendment"), was enacted through a

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[1] Pursuant to S. Ct. R. 37.6, *amicus curiae* certifies that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus* or his counsel make a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

ballot initiative, rather than by the state legislature, J.A. 17-18.[2] An initiative may not be used to enact legal provisions governing the "Manner" of holding congressional elections, however, because the Elections Clause delegates such authority exclusively to the state legislature. This Court's holding to the contrary in *Ohio* ex rel. *Davis v. Hildebrant*, 241 U.S. 565, 569-70 (1916), should be overturned.

Substantively, the IRC Amendment purports to strip the Arizona legislature of a critical part of its authority under the Elections Clause to regulate the "Manner" in which congressional elections are held by drawing congressional districts. ARIZ. CONST. art. IV, pt. 2, § 1(3), (14), (16). The IRC Amendment is unconstitutional—entirely apart from concerns about the manner in which it was enacted—because it attempts to transfer authority over redistricting that the U.S. Constitution expressly and directly confers on the state legislature to a different, independent entity.

Underlying both of these arguments is the fundamental premise that the term "legislature," as used in the Elections Clause, refers exclusively to the multimember body of representatives within each state generally responsible for enacting its laws. An intratextual approach to the Elections Clause (as well as its Article II analogue, the Presidential Electors Clause, U.S. CONST. art. II, § 1, cl. 2) demonstrates that the term consistently bears this meaning on every other occasion on which it is

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[2] "J.A." refers to the Joint Appendix filed by the parties.

used throughout the rest of the Constitution. No persuasive reason exists for attributing it a different and highly unusual meaning in the context of federal elections. *See generally* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause* (unpublished manuscript), *available at* http://ssrn.com/abstract=2515096 (forthcoming 109 NW. U. L. REV. ONLINE ___ (2014)).

This intratextual interpretation is bolstered by both the original understanding of the term "legislature," as well as the "independent state legislature" doctrine which this Court—as well as the U.S. House of Representatives, the U.S. Senate Committee on Privileges and Elections, and numerous state supreme courts—has embraced. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892); *cf. Leser v. Garnett*, 258 U.S. 130, 135 (1922); *Nat'l Prohibition Cases*, 253 U.S. 350, 386 (1920). The "independent state legislature" doctrine recognizes that, because state legislatures derive their power to regulate federal elections from the U.S. Constitution, state constitutions may not impose substantive restrictions on the scope of that authority. The IRC Amendment therefore is a nullity.

ARGUMENT

I. THE TERM "LEGISLATURE" SHOULD BE INTERPRETED INTRATEXTUALLY, AS REFERRING TO A STATE'S PRIMARY ELECTED LAWMAKING BODY

Intratextualism teaches that the meaning of a word or phrase that appears in a particular clause of the Constitution can be clarified by considering its meaning in other passages. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999). Intratextualism counsels readers to "plac[e] textually nonadjoining clauses" of the Constitution "side by side for careful analysis," to ensure that a term's meaning makes sense in the various contexts in which the Constitution deploys it. *Id.* The Constitution's use of "strongly parallel language" in different places "is a strong (presumptive) argument for parallel interpretation" of that language. *Id.* A major virtue of this approach is that "it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses." *Id.* at 795.

This Court has applied intratextualism to clarify the meaning of several constitutional provisions. For example, Chief Justice John Marshall adopted such an approach in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 412 (1819), in construing the Commerce Clause. And Justice Joseph Story did so in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329, 330 (1816), concerning the Article III Vesting

Clause. More recently, in *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008), this Court interpreted the phrase "right of the people" as used in the Second Amendment to protect an individual right to bear arms in large part because the Constitution's three other uses of that phrase "unambiguously refer to individual rights."

Intratextualism is an especially useful tool for determining the meaning of the term "Legislature" in the Elections Clause. The word is concrete and reasonably susceptible of only a limited number of definitions. Moreover, the term does not appear to lend itself to the type of compromise or mutually inconsistent understandings to which other, more general language might be subject. *Cf.* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 731, 742 (2000). Additionally, the original, unamended Constitution uses "Legislature" on numerous different occasions, thereby avoiding the issue of whether subsequent constitutional amendments employ it in the same manner. *Cf. id.* at 731, 765. Indeed, in *Hawke v. Smith*, 253 U.S. 221, 227-28 (1920), this Court adopted an intratextual interpretation of the term "legislature" as it appears in Article V.

The Constitution's references to state "Legislatures" may be divided into four groups:

(i) those that discuss features of a "Legislature";

concurring); see also *id.* at 1041 (Clark, J., dissenting on the ground that the "type of political gerrymandering" evident in all maps submitted by Commission members impermissibly put the members' "own political self-interests above the citizens' right to a fair and representative form of government"). In the 1992 election, the Republicans gained seats in the Senate and controlled that chamber through 2002. Canary & Redfield, *supra*, at 14.

The Democrats then had the opportunity to draw the map for two cycles in a row. In 2001, the Democrats won the tie-breaker. *Id.* at 14-15; Jackson & Prozesky, *supra*, at 10. And in 2011, the tie-breaker was an unnecessary step because the Democrats held veto-proof majorities in both chambers, allowing them to draw and pass the map without any votes from Republican legislators. Canary & Redfield, *supra*, at 15; Cervantes & Fentress, *supra*, at 12.

In every election immediately following the drawing of a new legislative map, the party that drew the map made gains in the legislature. Canary & Redfield, *supra*, at 18. But the gains made by the Democrats after controlling the legislative map for two consecutive cycles were particularly striking. After winning the "tie-breaker" in 2001, Democrats in the 2002 election won 56% of the seats in the House, and 54% of the seats in the Senate. These numbers closely mirrored the percentage of aggregate votes for Democratic candidates statewide (53% and 55%, respectively). *Id.* at 19. In the 2012 election, after the Democrats controlled the map without an intervening Republican-leaning election, the Democrats won 60% of House seats and 68% of

Senate seats—but the percentage of aggregate votes for Democratic candidates statewide slightly *decreased*, to 52% and 54%, respectively. *Id.*; see also James Slagle et al., Midwest Democracy Network, *Redistricting and Representation in the Great Lakes Region* 42 (2013).

Illinois Republicans challenged the 2011 Democratic map in federal court, alleging, among other things, claims for political gerrymandering in violation of the U.S. Constitution. *Radogno* v. *Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at *3 (N.D. Ill. Oct. 21, 2011). The court rejected these challenges, declaring them "currently unsolvable" as a judicial matter. *Id.* at *6. Thus, the 2011 Democratic map was upheld, and the Democrats secured their veto-proof majorities in the House and the Senate in the 2012 election.

The partisan legislative district mapmaking process in Illinois has severely undermined competition in the Illinois legislative districts. Canary & Redfield, *supra*, at 20. Since 1982, there has been a dramatic drop in contested general elections in Illinois—meaning, an election with candidates from each major party on the ballot. For example, in 1982, there were 90 contested House races out of 118 House seats. By 2012, that dropped by almost half, to 47. *Id.* The Senate followed a similar trend—in 1982, there were 47 contested Senate races out of 59, which dropped to 29 out of 59 in 2012. *Id.*

The party that controls the state legislative redistricting process also, as a practical matter, controls congressional redistricting. The complete lack of independent voice in congressional redistricting in Illinois has led to incumbent

protection maps resulting from allowing representatives to choose their constituents, rather than having constituents choose their representatives. And incumbents have indeed been protected: 104 out of 105 congressional incumbents in Illinois were re-elected between 1998 and 2008. Slagle, *supra*, at 8. In 1998 and 2000, there were no close congressional elections in either the primary or the general elections in any of Illinois's 19 congressional districts. Kent Redfield, *Drawing Congressional Districts in Illinois: Always Political, Not Always Partisan*, *in The Political Battle Over Congressional Redistricting* 369, 378 (William J. Miller & Jeremy D. Walling eds., 2013).

The 2001 congressional map is a prime example of incumbent protection. All of Illinois's incumbents (10 Democrats and 10 Republicans) were expected to seek reelection to the U.S. House of Representatives in 2002, depending on the outcome of the 2001 redistricting process. *Id.* However, 2000 census data revealed that Illinois would lose a congressional seat for the 2002 election. The General Assembly Democrats allowed the congressional leaders to draw the map for Illinois congressional districts, and they ultimately negotiated a map that protected all incumbents except two, a Democrat and a Republican who were thrown into the same district. Jackson & Prozesky, *supra*, at 7-8.

Ten years later, in 2011, Democrats redrew the districts alone. The Democratic map redrew the congressional districts in ways that made it harder for Republican members, both newcomers elected in 2010 and veterans, to hold onto their seats. Slagle, *supra*, at 42-45. A group of Republican U.S. House Representatives brought suit to invalidate the map

under several theories, including partisan gerrymandering. *Comm. for a Fair & Balanced Map* v. *Ill. State Bd. of Elections*, 835 F. Supp. 2d 563 (N.D. Ill. 2011). In their Amended Complaint, the plaintiffs alleged:

> [T]he Proposed Congressional Plan—which the New York Times has called "[p]erhaps the most aggressive example of partisan maneuvering" to arise out of the 2010 national census—effectively reverses the results of the 2010 congressional elections by redrawing districts so that the citizens of Illinois that gave Republicans an 11 to 8 advantage in Illinois's congressional delegation only one year ago would see the state's congressional delegation transformed to one with 12 Democrats and only 6 Republicans (with Illinois having lost one seat in national reapportionment).

Am. Compl. at 2, *Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d 563 (Nov. 4, 2011) (No. 1:11-CV-5065). The court dismissed the partisan gerrymandering claims. *Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d at 574, 593. In the 2012 elections, Democrats, who won 55% of the votes, took two-thirds of the U.S. House seats (12 out of 18), as predicted. Slagle, *supra*, at 44.

B. To Overcome Sole Partisan Control Of Redistricting In Illinois's General Assembly, Flexible Solutions Must Be Available.

In January 2009, then-Lieutenant Governor Pat Quinn established the Illinois Reform Commission ("IRC"), which was tasked with recommending meaningful ethics reform for the State of Illinois in

100 days. Ill. Reform Comm'n, *100-Day Report* 1 (2009). The IRC reviewed materials from experts on governmental structure and the legislative process and heard testimony from a number of witnesses. *Id.* at 48-53. The IRC made the following findings about Illinois's redistricting process:

> The current system in Illinois for drawing congressional and state legislative districts following a federal decennial census places Illinois voters in direct conflict with the legislators who are supposed to represent them. Behind closed doors, political operatives scrutinize the voting history of constituents to draw boundaries intended to protect incumbents or draw "safe" districts for either the Democratic or Republican parties. The results are gerrymandered districts that are neither compact nor competitive and do not serve the best interests of the people of Illinois.

Id. at 48.

The IRC unanimously recommended comprehensive redistricting reform for both state legislative and congressional redistricting processes, and proposed a number of specific legislative reforms, including the establishment of a Temporary Redistricting Advisory Committee and a non-partisan Redistricting Consulting Firm. *Id.* at 54-57. The IRC recommended adopting legislation to restore fairness to the process by which state and congressional legislative districts are drawn. *Id.* at 57. Despite the IRC's recommendations, no solution to partisan entrenchment has yet emerged from the Illinois General Assembly.

In the event the attempts to achieve reform through the legislative process failed, the IRC recommended "that a direct voter petition drive be led to get this constitutional amendment on the November 2010 general election ballot." *Id.* As described above, the Illinois Constitution allows only one form of voter-proposed constitutional amendments—amendments to article IV, the Legislative Article. And such an amendment is permissible only if it is (i) "limited to structural and procedural subjects contained in Article IV" and (ii) is supported by a petition that is signed by a large number of voters (equal in number to at least 8% of the total votes cast in the last gubernatorial race). Ill. Const. art. XIV, § 3.

Facing the prospect that partisan entrenchment would persist until and unless voters took control, Illinois voters acted. In 2014, a citizen group called Yes for Independent Maps gathered more than half a million signatures from registered voters in Illinois for a proposed constitutional amendment that would substitute an independent commission and non-partisan guidelines for Illinois's highly politicized redistricting process. Mem. of Def. Yes for Independent Maps in Supp. of its Mot. for J. on the Pleadings at 2, *Clark* v. *Ill. State Bd. of Elections*, No. 14-CH-07356 (Ill. Cir. Ct. Cook Cty. May 20, 2014). The amendment was struck down by an Illinois court because it contained one provision that fell outside the limited allowance for voter initiatives. *Clark*, No. 14-CH-07356, slip op. at 3-11 (June 27, 2014). But the court made clear that a "differently drafted redistricting initiative could be valid" under the Illinois Constitution's allowance for amendments needed to overcome legislative inaction. *Id.* at 11.

Thus, for now, the Democratic majority in the General Assembly retains sole control of state and congressional legislative district maps in Illinois. And no solution to partisan redistricting has been forthcoming from that institution. However, the Illinois Constitution offers voters a safety valve. And Illinois voters have shown themselves willing and able to circumvent partisan entrenchment through a voter-sponsored initiative for independent redistricting that is within the bounds of the Illinois Constitution.

This is precisely the form of innovative solution devised through intra-state self-governance that our federalist structure anticipates is the exclusive province of the state and its citizens. Illinois's path to this point—including its unique provisions for state legislative redistricting and the individuals and circumstances that make up Illinois's political history—require an Illinois-specific solution to the Illinois-specific problem of partisan redistricting and entrenchment. Arizona voters used their authority under that State's constitution to establish an independent redistricting commission. Illinois voters may take a similar tack—or they may adopt an entirely different solution.

How Illinois chooses to organize its legislative process "is a matter of state polity," *Smiley*, 285 U.S. at 368—not a matter of federal concern. The Elections Clause authorizes states to create laws concerning congressional elections, and it does not purport to restrain states in their internal delegation of state legislative power. In short, the Elections Clause does not deprive states of the sovereignty that the Constitution's federalist structure guarantees.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1314

In The Supreme Court of the United States

ARIZONA STATE LEGISLATURE, APPELLANT

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR LEAGUE OF WOMEN VOTERS OF ARIZONA, INTER TRIBAL COUNCIL OF ARIZONA, INC., ARIZONA ADVOCACY NETWORK, DENNIS M. BURKE, AND BART TURNER AS AMICI CURIAE SUPPORTING APPELLEES

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BRIEF FOR LEAGUE OF WOMEN VOTERS OF ARIZONA, INTER TRIBAL COUNCIL OF ARIZONA, INC., ARIZONA ADVOCACY NETWORK, DENNIS M. BURKE, AND BART TURNER AS AMICI CURIAE SUPPORTING APPELLEES

The League of Women Voters of Arizona, the Inter Tribal Council of Arizona, Inc., the Arizona Advocacy Network, Dennis M. Burke, and Bart Turner respectfully submit this brief as amici curiae in support of appellees.[1]

INTEREST OF AMICI CURIAE

Amici are individuals and organizations that support Proposition 106, a voter initiative enacted in 2000 to create the Arizona Independent Redistricting Commission and give it primary responsibility for congressional and state legislative redistricting. Amici believe that Proposition 106 was an important and valuable reform of the redistricting process in Arizona and one fully within the constitutional authority of the people of the State to enact. The amici are as follows:

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[1] Letters from the parties granting blanket consent to the filing of amicus curiae briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The **League of Women Voters of Arizona** (LWVAZ) is a non-profit organization that works to encourage the informed and active participation of citizens in government. Since 1967, LWVAZ has advocated for use of an independent commission to redistrict legislative and congressional districts in Arizona at regular intervals, subject to judicial review.

The **Inter Tribal Council of Arizona, Inc.** (ITCA) is a private, non-profit Arizona corporation established to provide its 21 Member Tribes with a means for action on matters that affect them collectively and individually. For decades, ITCA has promoted Native American voting rights in Arizona and provided voter education programs for its members. The reservations of ITCA Tribes often cross state boundaries and span several Arizona counties. In the past, the Arizona Legislature has attempted to split tribal reservations into multiple legislative and congressional districts, which would have resulted in confusion of Indian voters and dilution of the potential power of their votes. ITCA thus has a direct interest in the process and integrity of the Arizona Independent Redistricting Commission.

The **Arizona Advocacy Network** is a non-profit organization that supports the voter-established Independent Restricting Commission and its goal of creating more legitimate legislative and congressional districts for Arizona than the Arizona Legislature had drawn when it had primary responsibility for redistricting. The Arizona Advocacy Network believes the

Commission was properly created by voter initiative pursuant to Arizonans' reserved lawmaking power.

Dennis M. Burke and Bart Turner were two of the three principal drafters of Proposition 106. At that time, Mr. Burke was Executive Director of Arizona Common Cause, and Mr. Turner was Executive Director of the Valley Citizens League.

INTRODUCTION AND SUMMARY OF ARGUMENT

The position of the Arizona Legislature in this case is incompatible with Arizona's fundamental constitutional values and, if adopted, would place a cloud of constitutional doubt over longstanding, popularly-enacted election regulations in the State.

The Legislature ignores the fact that "one of the most distinct features of the Arizona Constitution is its focus on and trust in forms of direct democracy." Paul F. Eckstein, *The Debate Over Direct Democracy at the Arizona Constitutional Convention*, Arizona Attorney, Feb. 2012, at 32. That focus goes back to the very beginning of the State's history, when the people of the Arizona Territory drafted and approved a proposed state constitution expressly reserving lawmaking power for the people, to be exercised through voter initiative and referendum. The original Arizona constitution—enacted by the people, not the Legislature—also included a number of provisions directly regulating federal elections in the State.

Over the course of the century since the constitution's adoption, the people of Arizona have repeatedly "exercised their privilege to enact laws as a basic exercise of their democratic power[,] * * * bypass[ing] public officials who were deemed not responsive to the concerns of a majority of the voters." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) (plurality opinion). In particular, Arizonans have repeatedly used their reserved

lawmaking power to enact constitutional amendments and statutes to regulate elections in the State.

Proposition 106, which established the Arizona Independent Redistricting Commission, is therefore just one example of Arizonans' use of their initiative power to address agency problems that inhere in election regulation when exercised by politically-interested elected officials. Redistricting during the decades before enactment of the proposition was marred by legislative gridlock, partisan conflict, attempts to divide Indian reservations into separate districts, and, ultimately, the resort to judicially-crafted redistricting plans. Given the failure of the people's representatives in the Legislature to properly superintend the redistricting process, the people reasonably decided to vest that responsibility in an independent commission. That exercise of the people's reserved lawmaking power was consistent with the State's long history of direct lawmaking and was therefore well within the people's federal and state constitutional authority.

ARGUMENT

I. FROM THE BEGINNING, THE PEOPLE OF ARIZONA HAVE RESERVED LAWMAKING POWER FOR THEMSELVES

From its entry into the Union, the people of Arizona have reserved lawmaking power for themselves, to be exercised concurrently with that of the Legislature. As explained below, this reservation is a

foundational feature of the State's constitution, and it was born of Arizona's distinctive history.

A. The Tools Of Direct Democracy Were Central To The Arizona Constitution At The Time Of Its Adoption

Arizona endured nearly a half-century as a federally-governed territory before statehood, a fact that left those writing and voting on the State's proposed constitution "determined to reverse that tradition of unrepresentative government." John D. Leshy, The Arizona State Constitution 15 (2d ed. 2013); *see id.* at 6-7.[2]

1. State Constitutional Convention of 1910

In 1910, Congress finally enacted a statehood enabling act for Arizona. *See* Act of June 20, 1910, 36 Stat. 557. That statute authorized the "qualified electors of the Territory of Arizona" to elect delegates for a state constitutional convention, which was "authorized to form a constitution and provide for a state government for said proposed State." *Id.* at 568-69 (§§ 19-20).

Arizonans subsequently met in county conventions to elect delegates to the state constitutional

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[2] The Arizona territory was first organized in 1863, and as early as 1872, Arizona residents began agitating for statehood so that they could have a government responsive to local concerns. *See* Leshy, *supra*, at 4. In 1891, they went so far as to approve a proposed state constitution, but the effort failed. *See id.* at 4-5.

convention. Many of those county conventions also adopted platforms with provisions they wanted included in the state constitution, and delegates from those conventions pledged their support for those platform provisions. *See* Leshy, *supra*, at 8-9. Among the "principal issues captured in these [county convention] platforms" were the initiative (through which voters could initiate and adopt constitutional provisions and statutes), the referendum (through which voters could approve or disapprove measures passed by the legislature), and the recall of elected officials. *See id.* at 8. At that time, nine States had already adopted the initiative and referendum, and they were key planks in the reform agenda of the progressive movement, which was ascendant in western States. *See* Eckstein, *supra*, at 33; Leshy, *supra*, at 12.

Given the county-level platforms, large numbers of delegates arrived at the state convention in Phoenix in October 1910 having pledged to support those "tools of direct democracy" that they viewed as necessary to ensure a fully responsive and accountable state government. Leshy, *supra*, at 12. There was thus never any doubt that these provisions would be included in the state constitution. *See ibid.*

"The people have expressed their wish that a check be placed upon the abuses by the legislature and this is our only opportunity to do so," Mulford Winsor of Yuma County told his fellow delegates. The Records of the Arizona Constitutional Convention of 1910, at 2, 193 (John S. Goff ed., 1991) [hereinafter

Records]. "It has been necessary to have some means of checking the actions of the legislature of Arizona as well as other states," he continued, "and this is the very reason for the agitation for the initiative and referendum." *Id.* at 193.

Delegate A.C. Baker of Maricopa County told the convention that initiative and referendum "initiate[ ] a true republican form of government, and will enable the people of this state to hold the government within their control." *Id.* at 2, 189. Baker observed that the people of Arizona would be voting to approve the state constitution as an original matter and, "[i]f they have the ability to pass upon it as a whole, they certainly would have the ability to pass upon any amendment to that constitution." *Id.* at 190.

The handful of opponents of initiative and referendum at the convention offered virtually no substantive criticisms of the devices. Instead, they made constitutional and political arguments. *See* Eckstein, *supra*, at 34. Opponents principally contended that inclusion of initiative and referendum in the state constitution would violate the Guarantee Clause of the federal Constitution, U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government * * * .").

For example, Samuel Kingan of Pima County opined that the "republican government" addressed by the Guarantee Clause was limited to "a government by representatives chosen by the people." *Records*, *supra*, at 2, 199. He contended that it was a

category of government distinct from monarchy on the one side and, on the other, "democracy, in which the people or community as an organized whole wield sovereign powers of government." *Id.* at 199. Including initiative and referendum in the Arizona constitution, Kingan argued, would render the State's government an unconstitutional "democracy." *Ibid.*; *see also id.* at 198-205.

Kingan also observed that, at the time of the Arizona convention, a Guarantee Clause challenge to the Oregon constitution's initiative and referendum provisions was pending in the United States Supreme Court.[3] He predicted that the pendency of that case would lead President Taft to delay approval of Arizona's constitution, and, if the Court invalidated Oregon's initiative and referendum provisions, to reject Arizona's constitution. *Id.* at 205.

Supporters of initiative and referendum countered both the constitutional and political objections. A.F. Parsons of Cochise County addressed the Guarantee Clause question, arguing that the "republican form of government" guaranteed by that provision was meant only "to abolish the old form of government, * * * commonly called a monarchy" and to ensure government "from the consent of the

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[3] In that case, the Court ultimately held that the challenge presented a non-justiciable political question. *See Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912). The decision came five days after Arizona was admitted as a State. *See* Leshy, *supra*, at 12 n.32.

governed." *Id.* at 2, 747. "I do not believe," Parsons stated, "it will be seriously contended that the manner of the expression of that consent, whether in person or by representatives, was deemed material." *Id.* at 747; *see also ibid.* (arguing that "a republican form of government is one where the people at large retain the supreme power and act either collectively or by representation").

Parsons contended that the constitutional argument against initiative and referendum was illogically based on "the unique legal proposition * * * that an agent has more power than a principal who has supreme power." *Id.* at 747-48. "The statement of this proposition is its own refutation. If their argument be tenable then the creature may be greater than his creator, all of which we deny." *Id.* at 748.

Foreshadowing this Court's holding two years later, *see supra* note 3, Parsons also observed that enforcement of the Guarantee Clause was "not a question for judicial determination" and instead was a political question for Congress. *Records*, *supra*, at 748. He pointed out that Congress had already addressed the question by "recogniz[ing] the right of the senators and representatives from the several states which have adopted the initiative and referendum." *Ibid.*

Initiative and referendum supporters also rejected opponents' prediction that those provisions would provoke a constitutional objection from President Taft. Lamar Cobb of Graham County pointed out

that President Theodore Roosevelt had supported statehood for Oklahoma, even though that State's original statehood constitution included initiative and referendum. *See id.* at 2, 744-45; *see also* Eckstein, *supra*, at 33. Indeed, Taft, then a member of President Roosevelt's cabinet, had been dispatched to Oklahoma to make policy arguments against adoption of its constitution, but, as Cobb noted, "not one word did he say, not the slightest intimation or suggestion that it might be unconstitutional." *Records*, *supra*, at 745. Cobb assured his fellow delegates that they should have "no fear of losing or delaying statehood by incorporating these provisions in our constitution." *Ibid.*

The Reverend Crutchfield, the convention's chaplain, also sought to reassure delegates on this point, stating in one of his opening prayers during the last week of the convention: "Oh Lord, we are not willing to believe President Taft will turn down our constitution on account of such a small matter as the Recall, Initiative and Referendum which is written in the constitution as the people of the great State of Arizona desire to be governed by." *Id.* at 714.

In the end, initiative and referendum had overwhelming support at the convention. Article IV of the constitution, which includes those provisions, was approved by a vote of 42-8. *Id.* at 906. The convention subsequently approved the constitution as a whole, and Arizona voters did the same by a three-to-one margin. *See* Leshy, *supra*, at 22.

2. Congress and President Taft

In August 1911, Congress overwhelmingly approved a joint resolution admitting Arizona as a State, and it did so with full knowledge of the initiative and referendum provisions in its constitution. *See* 47 Cong. Rec. 1529 (1911) (House); 47 Cong. Rec. 3742 (1911) (Senate); *see also* Appellees' Br. 49 n.27. Congress also approved statehood for Arizona with full knowledge that the popularly enacted constitution contained provisions regulating federal elections. *See infra* pp. 16-18.

The statehood enabling act had required that the Arizona constitution "be republican in form." 36 Stat. at 569 (§ 20). Some members of Congress contended that the initiative and referendum provisions in the Arizona constitution violated that requirement and represented a "distinct departure from the fundamental principles of a representative government." 47 Cong. Rec. 4121 (statement of Sen. Bailey); *see also, e.g.*, 47 Cong. Rec. 1501 (statement of Rep. Littleton).

Other members, however, successfully countered that initiative and referendum were entirely consistent with not only the Guarantee Clause but also with the principles of popular sovereignty underlying the federal constitution. For example, Representative McGuire stated that he did not "believe that the provisions for the initiative and referendum are repugnant to the Constitution of the United States." 47 Cong. Rec. 1499. He explained that the "evident purpose of these provisions" was consistent with popular

sovereignty, i.e., giving the people the right to "direct legislative bodies by themselves initiating the kind and character of legislation desired" and to "pass judgment upon important legislation, and approve or disapprove at the ballot box legislative acts before they become effective." *Ibid.*; *see* 47 Cong. Rec. 1506 (statement of Rep. Jackson) ("[W]hat harm can result in these States, in adopting their constitutions, if they wish to devolve certain powers of legislating upon their people?").

Congress did not have the last word, however, because the statehood enabling act included an unusual provision requiring the consent of the President as well. 36 Stat. at 571-72 (§§ 22-23); *see* Leshy, *supra*, at 6. President Taft used that power to veto the joint resolution, and he did so for a single reason: his opposition to the state constitution's provision allowing for popular recall of state judges. *See* Veto Message Returning Without Approval a Joint Resolution for the Admission of the Territories of New Mexico and Arizona into the Union as States (Aug. 22, 1911), *in* 16 A Compilation of the Messages and Papers of the Presidents 7636, 7636-37 (n.s. 2010); *see id.* at 7637 (calling that provision "destructive of independence in the judiciary"). President Taft expressed no concern about initiative and referendum. *See id.* at 7636-44; *see also* 47 Cong. Rec. 4230 (statement of Rep. Davenport) ("No question [was] raised by the President as to the initiative and referendum.").

Almost immediately, Congress sent President Taft a modified joint resolution, making statehood conditional on Arizona voters' deletion of the judicial recall provision from the state constitution. *See* Leshy, *supra*, at 22. "Having been forcefully apprised of the price of admission, the Arizona voters dutifully removed the recall by a margin of nearly nine to one" in December 1911. *Ibid.*

On February 14, 1912, President Taft signed a proclamation admitting Arizona as a state. *Ibid.*[4]

B. The Arizona Constitution's Terms And Structure Expressly Reserve Lawmaking Power For The People

The core provisions of the Arizona constitution addressing initiative and recall, which are largely unchanged from their enactment as described above, are expressly based on the principle that the State's lawmaking power was *both* delegated to the Legislature and reserved by the people.

Article III of the constitution, titled "Distribution of Powers," provides that governmental power in Arizona is divided into "three separate departments": the legislative, executive, and judicial. Ariz. Const. art. III. Article IV, governing the "Legislative Department," has separate parts on initiative and

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[4] Later in 1912, Arizona voters approved an amendment to the state constitution (by a margin of nearly 50 to one) adding back the deleted judicial recall provision. *See* Leshy, *supra*, at 23.

referendum (Part 1) and the Legislature (Part 2). As this structure demonstrates, initiative and referendum are part of the "legislative department" of the State. *See id.* art. IV; *see also Winkle v. City of Tucson*, 949 P.2d 502, 504 (Ariz. 1997) (describing "the people's power to create legislation through initiative" as "[p]art of [the] legislative process" of the State); *Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors*, 501 P.2d 391, 393 (Ariz. 1972) ("[T]he constitutional reservation of initiative and referendum powers establishes the electorate as a coordinate source of legislation with the constituted legislative bodies.").

The constitution again makes that understanding express when it provides:

> The legislative authority of the State shall be vested in the Legislature, consisting of a Senate and a House of Representatives, but the people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any Act, or item, section, or part of any Act, of the Legislature.

Ariz. Const. art. IV, pt. 1, § 1(1); *see id.* § 1(2) ("The first of these reserved powers is the Initiative."); *id.* § 1(3) ("The second of these reserved powers is the Referendum."); *see also id.* art. XXII, § 14 ("Any law which may be enacted by the Legislature under this

Constitution may be enacted by the people under the Initiative. Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people.").

Under this structure, "the Legislature and the people constitute the lawmaking power." *Allen v. State*, 130 P. 1114, 1118 (Ariz. 1913). "The people did not commit to the Legislature the whole lawmaking power of the state, but they especially reserved in themselves the power to initiate and defeat legislation by their votes." *Ibid.*; *see Tilson v. Mofford*, 737 P.2d 1367, 1369 (Ariz. 1987) ("Under our constitution, * * * [t]he legislative power of the people is as great as that of the legislature."). The two lawmaking bodies do not have equal power, however, for the power of the Legislature is expressly "subordinated to the superior right of the people to themselves legislate at the polls." *Home Builders Ass'n of Cent. Ariz., Inc. v. Riddel*, 510 P.2d 376, 378 (Ariz. 1973).[5]

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[5] In 1998, Arizona voters initiated a constitutional amendment that prohibits the Legislature from repealing any voter-initiated measure. *See* Ariz. Const. art. IV, pt. 1, § 1(6)(B). The same constitutional amendment prohibits the Legislature from amending any initiative measure without a three-fourths vote in each house, and only if the amendment furthers the purposes of the measure. *See id.* § 1(6)(C). These provisions "substantially restrict[ ] the power of the legislature to tinker with popularly approved measures." Leshy, *supra*, at 131.

II. FROM THE BEGINNING, THE PEOPLE OF ARIZONA HAVE DIRECTLY ENACTED MEASURES TO REGULATE ELECTIONS

From the moment of statehood, Arizonans have exercised their direct lawmaking power to regulate elections. They did so by enacting election regulations as part of the original constitution, by subsequently amending that constitution through initiative and referendum, and by enacting election statutes through the same mechanisms. Voters in many other States have likewise regulated elections through use of their initiative power. *See* Appellees' Br. 51-54 & App. B.

This Court long ago observed that questions of constitutional interpretation involving allocation of government power "ought to receive a considerable impression" from "the practice of the government." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) ("[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."). In this case, the consistent practice in Arizona (and other States) has been to regulate elections through use of the people's reserved law-making power.

A. The Arizona Constitution As Originally Adopted By The People Regulated Elections

As the history recounted above explains, the Arizona constitution was approved by the people in a popular referendum—not by the Legislature. That original constitution included several provisions regulating elections in the State—none of which appears to have elicited any objection when the constitution was before Congress and President Taft as they considered statehood for Arizona.

Among the provisions in the original constitution were those laying the essential building blocks of all future elections in the State. Most fundamentally, the constitution provided that the candidate who received the most votes would be the winner. *See* Ariz. Const. art. VII, § 7. It required election by secret ballot. *See id.* § 1. The constitution established an at-large election for the State's (at that time) sole member of the House of Representatives. *See id.* art. XXII, § 12. And it provided that "[a]ll elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." *Id.* art. II, § 21.

The Arizona constitution as originally enacted also required direct primary elections (as opposed to conventions) "for the nomination of candidates for all elective State, county, and city offices, including candidates for United States Senator and for Representative in Congress." *Id.* art. VII, § 10. This was a

"distinctly progressive innovation in 1910, recognizing that general elections could be made meaningless if political machines hand-picked the candidates." *Leshy*, *supra*, at 239. Additionally, the original constitution prohibited loss of residency for purposes of voting for anyone who moved out of state while serving in the military or attending school. *See* Ariz. Const. art. VII, § 3.

B. The People Of Arizona Have Repeatedly Amended Their Constitution To Regulate Elections

The Arizona constitution may be amended only by the people, Ariz. Const. art. XXI, §§ 1-2, and they have done so more than 150 times since its enactment, *see* Leshy, *supra*, at 3. Many of those amendments have involved regulation of elections and voting, *see infra* App. A (listing amendments), and at least some of them would seemingly be thrown into constitutional doubt as applied to federal elections if the Legislature's position in this case were to prevail.

In 1912, Arizonans went to the polls for the first time as residents of a State. On their ballots was a voter-initiated measure to extend the right to vote to women, and they enacted it by a 2-1 margin. Through an exercise of popular lawmaking, Arizona thus allowed women to vote eight years before ratification of the Nineteenth Amendment. *See* Toni McClory, Understanding the Arizona Constitution 34 (2d ed. 2010).

Arizonans have used their initiative power over the constitution to expand the franchise in other ways as well. For example, Arizona voters in 1998 approved Proposition 103 to allow registered independents, persons with no party preference, and minor party members to vote in major party primaries, including those for federal office. *See* Ariz. Const. art. VII, § 10; Leshy, *supra*, at 240. "A number of states have adopted such measures in recent years, both in recognition of the growing number of political independents and on the theory that allowing them the franchise will tend to lead to more centrist candidates than would otherwise emerge from partisan primaries." Leshy, *supra*, at 240.

The people of Arizona have also amended the constitution to provide for the filling of congressional vacancies. As originally adopted, the Arizona constitution was silent on this issue. In 1962, voters approved an amendment establishing a primary and general election for the election of a U.S. Senator or Representative in Congress when a vacancy occurs through resignation or any other cause. *See* Ariz. Const. art. VII, § 17; Leshy, *supra*, at 244.

Other constitutional amendments have also regulated elections. *See* Ariz. Const. art. XXII, § 18; Leshy, *supra*, at 430 ("resign-to-run" amendment enacted in 1980 and prohibiting occupant of a salaried elective office from running for or being appointed to any other public office, except during the final year of the term); Ariz. Const. art. VII, § 3; Leshy, *supra*, at 237 (2000 amendment to update provision from

original constitution on voting residence of federal employees and others temporarily outside the State).

C. The People Of Arizona Have Repeatedly Enacted Statutes To Regulate Elections

The people of Arizona have also used their initiative power to enact statutes to regulate elections in the State. *See infra* App. B. Again, the constitutionality of these measures, which were not enacted by the Legislature, would seemingly be thrown into doubt were the Legislature's interpretation of the Elections Clause to prevail in this case.

In response to poor voting turn-out in the 1980 presidential election and the high numbers of unregistered Arizonans, voters initiated and passed Proposition 202—the Motor Voter Initiative—as an additional means for people to register and maintain their voter registration. Rose Mofford, Ariz. Sec'y of State, 1982 Publicity Pamphlet, http://azmemory.azlibrary.gov/cdm/ref/collection/statepubs/id/10531 (last visited Jan. 22, 2015). The Motor Voter Initiative, codified at Ariz. Rev. Stat. § 16-112, allows every person qualified to vote to register when applying for a driver's license.

In 2004, Arizona voters adopted Proposition 200, "a ballot initiative designed in part 'to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2252 (2013) (quoting *Purcell v. Gonzalez*,

549 U.S. 1, 2 (2006) (per curiam)). "Proposition 200 amended the State's election code to require county recorders to 'reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship.'" *Ibid.* (quoting Ariz. Rev. Stat. § 16-166(F)).

Like the Motor Voter Initiative, voters initiated and passed Proposition 200, which regulates federal elections, without the Legislature's participation. It is telling that, despite being subject to extensive litigation, the initiative was never challenged as invalid because it was not enacted by the Legislature. *See, e.g.*, *id.* at 2253-60 (holding that, by operation of the Elections Clause, the National Voter Registration Act preempted Arizona's proof-of-citizenship requirement).

III. THE INDEPENDENT REDISTRICTING COMMISSION IS JUST A RECENT EXAMPLE OF A VOTER-INITIATED AND APPROVED ELECTION REFORM IN ARIZONA

As the discussion above shows, Arizonans' use of their initiative power to enact Proposition 106, the redistricting measure at issue in this case, was not at all novel. That proposition was in fact just one of the latest examples of voters' use of the initiative power to identify and correct problems with Arizona elections.

A. Before Enactment Of Proposition 106, The Arizona Legislature Failed To Fulfill Its Redistricting Responsibilities

Before enactment of Proposition 106 in 2000, Arizona "had experienced a troubled redistricting history." Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1830 (2012). Indeed, the decades before enactment of Proposition 106 saw grave "[r]edistricting controversies" recurring like clockwork every ten years. Barbara Norrander & Jay Wendland, *Redistricting in Arizona*, *in* Reapportionment and Redistricting in the West 177, 178 (Gary Moncrief ed., 2011).

The plan adopted by the Legislature after the 1970 census was invalidated by a district court "for splitting the Navajo tribe reservation into three separate state legislative districts." Cain, *supra*, at 1830. The court replaced the Legislature's plan with a judicially drawn one, which placed the Navajo reservation in a single district. *See ibid.*; Norrander & Wendland, *supra*, at 178.

In 1981, the Legislature adopted redistricting maps, but they were vetoed by the Governor. The Legislature then overrode the veto. Its plan, however, was rejected by a district court "for diluting the Native American vote and failing to achieve sufficiently equal population." Cain, *supra*, at 1830. In particular, the rejected legislative plan would have divided the San Carlos Apache Reservation into three legislative districts and three congressional districts.

See Goddard v. Babbitt, 536 F. Supp. 538, 541 (D. Ariz. 1982). The post-1980 litigation was ultimately resolved when the parties agreed to submit stipulated revisions to redistricting plans, which were approved by the court. The stipulated revisions placed the San Carlos Apache Reservation into a single legislative and congressional district. *Id.* at 543.

After the 1990 census, the Arizona House of Representatives and the Arizona Senate failed to agree on a redistricting plan and thus did not enact one. Years of litigation commenced. "All together, the 1992 redistricting experience included sharp partisan divisions delaying the adoption of a legislatively drawn plan, a court imposed plan for congressional districts, rejection of the state legislative district plan by the Department of Justice, plans adopted or imposed during an election year, and a total of five court cases." Norrander & Wendland, *supra*, at 179.

B. Arizonans Enacted Proposition 106 To Address Failures In Redistricting By The Legislature

Given the Legislature's poor redistricting track record, many Arizonans by the late 1990s were ready to use their reserved lawmaking power to delegate that responsibility to a different entity. They therefore placed on the ballot and enacted a measure, Proposition 106, delegating the power to redistrict to an independent, five-member commission. *See* Ariz. Const. art. IV, pt. 2, § 1; *see also* Norrander &

Wendland, *supra*, at 180 (noting that Proposition 106 "passed by a healthy margin: 56 to 44").[6]

The amendment provides that the leadership of the Arizona Legislature must choose four of the five Commission members, selecting from a slate of candidates nominated by a state nominating commission. *See* Ariz. Const. art. IV, pt. 2, § 1(3)-(7). The fifth member, not a member of either major political party, is chosen by the other four from the same slate of candidates. *See id.* § 1(8). Each Commission member is required to be "committed" to fulfilling his or her redistricting responsibilities "in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process." *Id.* § 1(3).

The Commission is required to draw districts that: are "geographically compact and contiguous to the extent practicable"; "respect communities of interest to the extent practicable"; and, "[t]o the extent practicable, * * * use visible geographic

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[6] Before enactment of the proposition, the Legislature passed a bill requiring the Legislature or "any entity that is charged with recommending or adopting legislative or congressional district boundaries" to use population data from the United States Census Bureau. *See* H.R. 2698, 44th Leg., 1st Reg. Sess. (Ariz. 1999) (codified at Ariz. Rev. Stat. § 16-1103). The Legislature included the "any entity" language in anticipation that Arizona voters would approve an independent redistricting commission. *See* David K. Pauole, *Race, Politics & (In)Equality: Proposition 106 Alters the Face and Rules of Redistricting in Arizona*, 33 Ariz. St. L.J. 1219, 1236 (2001).

features, city, town and county boundaries, and undivided census tracts." *Id.* § 1(14). Additionally, the initiative requires that "[t]o the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals." *Ibid.*

The redistricting commission is required to put its proposed district maps out for public comment. The Legislature may then make recommendations to the Commission, and those recommendations "shall be considered" before the Commission adopts final district lines. *Id.* § 1(16).

1. Proposition 106 had bipartisan support

Support for Proposition 106 was bipartisan. *See* Norrander & Wendland, *supra*, at 180. For example, the elected Superintendent of Public Instruction, a Republican who had previously served in the Legislature, supported Proposition 106, explaining:

> We need a simpler and fairer way to draw voting districts. Currently districts are drawn to promote single party dominance and protect incumbents resulting in reduced voter confidence. * * * The public will continue to be barred from meaningful participation in the process until we create an independent redistricting commission. * * * Current district maps are contorted boundaries lacing together isolated pockets of special interest to form bulletproof districts for incumbents. Decisions, if any, are made in

> the primary elections. Opponents argue a redistricting commission would eliminate public accountability. To the contrary, there is no public accountability now. District maps are secretly drawn by powerful party leaders, hidden from the public. Even other members of the legislature are barred from viewing the maps until they are essentially complete.

2000 Ballot Propositions: Proposition 106, at 56-57 (Nov. 7, 2000), *available at* http://www.azsos.gov/election/2000/info/pubpamphlet/english/prop106.pdf.

Janet Napolitano, then the Democratic Attorney General and later Governor, also urged voters to support Proposition 106, stating:

> It allows you, the citizen, to have a voice in drawing the boundaries of your legislative and congressional districts. Through open meeting throughout the state—not backroom dealing—we will have a process run by the public. * * * This initiative is fair to all Arizonans because it opens up the system to public scrutiny; it eliminates conflicts of interest by taking the process of redistricting out of incumbents' hands; and, it just might encourage more people to run for public office.

Id. at 57. In addition to elected officials, numerous civic groups and organizations supported Proposition 106. *See id.* at 57-58.

2. Arizona's Indian Tribes supported Proposition 106

Proposition 106 also had wide support from the 21 Indian Tribes with reservations in Arizona. As discussed above, redistricting by the Legislature from the 1970s to the 1990s was characterized by repeated efforts to dilute the voting power of Arizona's Indians and, in particular, divide reservations into separate districts. Those efforts occurred against a backdrop of Arizona Indians' long struggle for full voting rights.

Given the strong federal role in Indian affairs, congressional redistricting, and its impact on representation in Congress, is an issue of paramount concern for Tribes. Congress has plenary power over federally recognized Tribes on reservations. *See Choate v. Trapp*, 224 U.S. 665, 671 (1912); *see also* U.S. Const. art. I, § 8, cl. 3 (express control over commerce with Indian Tribes); *id.* cl. 1 (power to make expenditures for the general welfare); *id.* art. IV, § 3, cl. 2 (control over the property of the United States). Moreover, in Arizona, law enforcement on Reservations is the responsibility of federal and tribal governments.[7]

Indians' struggle to gain the right to register and vote in Arizona has been long and difficult. In 1924,

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[7] Indian Reservations constitute approximately 27 percent of Arizona's land, which is the highest percentage of Indian Reservation land in any State. *See Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 687 (D. Ariz. 1992).

Congress conferred citizenship on Arizona's Indians, but not the right to vote in the State. *See* Indian Citizenship Act of 1924, 43 Stat. 253. Four years later, the Arizona Supreme Court held that Indians in Arizona were under federal guardianship and, for that reason, had no right to vote guaranteed by the state constitution. *See Porter v. Hall*, 271 P. 411, 419 (Ariz. 1928). The Arizona Supreme Court did not overrule that decision until 1948. *See Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948). Under the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, Arizona was required to submit proposed congressional districts to the United States Department of Justice for approval because of the State's history of discrimination against certain minorities, including Indians.

Given this history, it is not surprising that the State's Indian Tribes strongly supported Proposition 106. Because the independent redistricting commission is required to "respect communities of interest to the extent practicable," Ariz. Const. art. IV, pt. 2, § 1(14), the Tribes viewed it as a means of keeping reservations within single districts instead of dividing them, as the Legislature had repeatedly attempted to do.

C. The Arizona Independent Redistricting Commission Has Performed Better Than The Legislature

Given the complexities of redistricting, no system for drawing district lines will be perfect. Redistricting by the Commission has been no exception. Yet the

Commission's track record has been far superior to the abysmal one put together by the Legislature in the decades preceding the Commission's creation.

The Commission has delivered district maps on time, drawn more compact districts, and created more competitive congressional seats. *See* Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. Irvine L. Rev. 637, 661, 663-64, 666 (2013); *see also* Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & Pol. 331, 339-40 (2007) (discussing empirical evidence showing that independent redistricting commissions, like Arizona's, create more competitive districts).

Moreover, in the experience of amici, the Commission has conducted its affairs faithfully and transparently. It has encouraged public participation, creating a marked contrast to the closed door sessions dominated by a select few when the Legislature was in charge of redistricting. The most recent redistricting process conducted by the Commission included 43 public hearings conducted throughout the State, attended by thousands of people. Almost every meeting was live-streamed online, allowing for even more participation. The Commission's website also provided an interactive mapping function.

To the extent the Commission can be improved, Arizona's voters stand ready to use their reserved lawmaking power to do so. Their ability to adopt

such additional reform measures involving elections should not be eliminated.

CONCLUSION

For these reasons, and those provided by Appellees, the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX A: Provisions From Arizona Constitution Regulating Elections

[Deletions are indicated by strikethrough. Additions are indicated by all caps.]

Provision	Relevant Constitutional History
Article II, § 21 Free and equal elections	**Original Arizona Constitution (adopted Dec. 9, 1910)**: All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. **No Constitutional Amendments.**
Article IV, pt. 2, § 1 Senate; house of representatives; members; special session upon petition of members; congressional and legislative boundaries; citizen commissions	**Original Arizona Constitution (adopted Dec. 9, 1910)**: Until otherwise provided by law, the Senate shall consist of 19 members, and the House of Representatives of 35 members, and Senators and Representatives shall be apportioned among the several counties, as follows: Apache county, 1 Senator, 1 Representative; Cochise county, 2 Senators, 7 Representatives; Coconino county, 1 Senator, 1 Representative; Gila county, 2 Senators, 3 Representatives; Graham county, 1 Senator, 2 Representatives; Greenlee county, 1 Senator, 2 Representatives; Maricopa county, 2 Senators, 6 Representatives; Navajo county, 1

Provision	Relevant Constitutional History
	Senator, 1 Representative; Pima county, 2 Senators, 3 Representatives; Pinal county, 1 Senator, 1 Representative; Santa Cruz county, 1 Senator, 1 Representative; Yavapai county, 2 Senators, 4 Representatives; Yuma county, 1 Senator, 2 Representatives. **Proposed by Initiative Petition, filed July 7, 1932 (approved election Nov. 8, 1932, eff. Nov. 28, 1932). It replaced Article IV, pt. 2, § 1 in its entirety with the following:** (1) The Senate shall consist of nineteen members, apportioned among the several. counties as follows: Apache County, one senator; Cochise County, two senators; Coconino County, one senator; Gila County, two senators; Graham County, one senator; Greenlee County, one senator; Maricopa County, two senators; Mohave County, one senator; Navajo County, one senator; Pima County, two senators; Pinal County, one senator; Santa Cruz County, one senator; Yavapai County, two senators; Yuma County, one senator. There shall be elected from each county at large the number of

Provision	Relevant Constitutional History
	senators to which such county is entitled, and there shall be elected from each county, in the manner hereinafter directed, one representative for each 2,500 votes, or major fraction thereof, cast in such county for the office of governor at the last preceding general election, to be determined from the official canvass of all votes cast in all counties for such office of governor; and provided that each county shall be entitled to have one representative and no county shall have a less number of representatives than it would otherwise be entitled to if the number thereof should be computed in the manner above set forth upon the total vote cast in such county for the office of governor at the general election held in the year 1930. Within twelve months from the time this amendment is declared adopted, the Board of Supervisors of each county entitled to more than one representative shall divide such county into as many legislative districts as there may be representatives to be elected from such county, and each of such districts shall be entitled to elect one representative. Such division shall be so made that the legislative districts

Provision	Relevant Constitutional History
	within a County shall contain, as nearly as may be, the same voting population. Such districts shall be compact in form, and no such district shall include non-contiguous portions of any county. Before establishing such district, the Board of Supervisors shall give at least thirty days' notice of their intention so to do, by publishing the same in two successive issues of some newspaper of general circulation published in such county. The order of the Board of Supervisors establishing such districts shall clearly and explicitly define the boundaries thereof, and shall be entered at large on the official records of the proceedings of such Board. Any such county shall be redistricted by such Board of Supervisors not less than six months prior to each regular election for representatives, when by reason of the number of votes therein cast for the office of governor at the last preceding general election, it shall be entitled to a greater number of representatives. In counties entitled to but one representative, such representative shall be elected from the County at large. . . .

Provision	Relevant Constitutional History
	Laws 1953, Senate Congressional Resolution ("S.C.R.") No. 1, § 1 (approved election Sept. 29, 1953, eff. Oct. 31, 1953). It replaced Article IV, pt. 2, § 1(1) in its entirety with the following: The Senate shall consist of two members from each county elected at large. Beginning with the Twenty-second Legislature the House of Representatives shall be composed of not to exceed eighty members, to be apportioned to the counties according to the number of ballots cast in each county at the preceding general election for governor in the manner herein provided. Such apportionment shall be made every four years and shall be on the basis of one Representative for each county and one additional Representative for each thirty-five hundred and twenty ballots cast at the last preceding general election, according to the official canvass of the votes cast in each county. In the event that on the basis prescribed the number of Representatives so determined shall exceed eighty, the unit of apportionment

Provision	Relevant Constitutional History
	shall be increased by ten or such multiple of ten as will reduce the number of Representatives to eighty. Not less than eight months prior to the regular general election following such apportionment at which Representatives are to be chosen, the secretary of state shall notify the board of supervisors of each county the number of Representatives such county will be entitled to elect, and the board shall not less than six months prior to such election, divide the county into as many legislative districts as there are Representatives to be elected. The district shall have as nearly as may be an equal voting population, be compact in form and include no noncontiguous territory. The board shall give not less than thirty days' notice of intention to divide the county into legislative district by publication in two successive issues of a newspaper of general circulation published in the county." **Laws 1972, S.C.R. No. 1001 (approved election Nov. 7, 1972, eff. Dec. 1, 1972). It replaced Article IV, pt. 2, § 1(1) in its entirety with the following**: The Senate shall be composed of one member elected from each of

Provision	Relevant Constitutional History
	the thirty legislative districts established by the legislature. The House of Representatives shall be composed of two members elected from each of the thirty legislative districts established by the legislature. . . . " **Prop. 106 (approved election Nov. 7, 2000, eff. Nov. 27, 2000). It replaced Article IV, pt. 2, § 1 in its entirety with the following:** (1) The senate shall be composed of one member elected from each of the thirty legislative districts established pursuant to this section. The house of representatives shall be composed of two members elected from each of the thirty legislative districts established pursuant to this section. (2) Upon the presentation to the governor of a petition bearing the signatures of not less than two-thirds of the members of each house, requesting a special session of the legislature and designating the date of convening, the governor shall promptly call a special session to assemble on the date specified. At a special session so called the subjects which may be considered by the legislature shall not be limited.

Provision	Relevant Constitutional History
	(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served

Provision	Relevant Constitutional History
	as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee. (4) The commission on appellate court appointments shall nominate candidates for appointment to the independent redistricting commission, except that, if a politically balanced commission exists whose members are nominated by the commission on appellate court appointments and whose regular duties relate to the elective process, the commission on appellate court appointments may delegate to such existing commission (hereinafter called the commission on appellate court appointments' designee) the duty of nominating members for the independent redistricting commission, and all other duties assigned to the commission on appellate court appointments in this section. (5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees,

Provision	Relevant Constitutional History
	with ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona. (6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. Each such official shall have a seven-day period in which to make an appointment. Any official who fails to make an appointment within the specified time period will forfeit the appointment privilege. In the event that there are two or more minority parties within the house or the senate, the leader of the largest minority party by

Provision	Relevant Constitutional History
	statewide party registration shall make the appointment. (7) Any vacancy in the above four independent redistricting commission positions remaining as of March 1 of a year ending in one shall be filled from the pool of nominees by the commission on appellate court appointments or its designee. The appointing body shall strive for political balance and fairness. (8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or its designee, striving for political balance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair. (9) The five commissioners shall then select by majority vote one of their members to serve as vice-chair.

Provision	Relevant Constitutional History
	(10) After having been served written notice and provided with an opportunity for a response, a member of the independent redistricting commission may be removed by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office. (11) If a commissioner or chair does not complete the term of office for any reason, the commission on appellate court appointments or its designee shall nominate a pool of three candidates within the first thirty days after the vacancy occurs. The nominees shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment, and the appointment other than the chair shall be made by the current holder of the office designated to make the original appointment. The appointment of a new chair shall be made by the remaining commissioners. If the appointment of a replacement commissioner or chair is not made within fourteen days following the presentation of the nominees, the commission on appellate court

Provision	Relevant Constitutional History
	appointments or its designee shall make the appointment, striving for political balance and fairness. The newly appointed commissioner shall serve out the remainder of the original term. (12) Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting commission shall conduct business in meetings open to the public, with 48 or more hours public notice provided. (13) A commissioner, during the commissioner's term of office and for three years thereafter, shall be ineligible for Arizona public office or for registration as a paid lobbyist. (14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth

Provision	Relevant Constitutional History
	below: A. Districts shall comply with the United States Constitution and the United States voting rights act; B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable; C. Districts shall be geographically compact and contiguous to the extent practicable; D. District boundaries shall respect communities of interest to the extent practicable; E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts; F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals. (15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of

Provision	Relevant Constitutional History
	incumbents or candidates shall not be identified or considered. (16) The independent redistricting commission shall advertise a draft map of congressional districts and a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. Either or both bodies of the legislature may act within this period to make recommendations to the independent redistricting commission by memorial or by minority report, which recommendations shall be considered by the independent redistricting commission. The independent redistricting commission shall then establish final district boundaries. (17) The provisions regarding this section are self-executing. The independent redistricting commission shall certify to the secretary of state the establishment of congressional and legislative districts. (18) Upon approval of this amendment, the department of administration or its successor shall make adequate office space available for the independent redistricting commission. The treasurer of the state shall make $6,000,000 available for

Provision	Relevant Constitutional History
	the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote. (19) The independent redistricting commission, with fiscal oversight from the department of administration or its successor, shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation. (20) The independent redistricting commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the independent redistricting commission. The independent redistricting commission shall have sole authority to determine whether

Provision	Relevant Constitutional History
	the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan. (21) Members of the independent redistricting commission are eligible for reimbursement of expenses pursuant to law, and a member's residence is deemed to be the member's post of duty for purposes of reimbursement of expenses. (22) Employees of the department of administration or its successor shall not influence or attempt to influence the district-mapping decisions of the independent redistricting commission. (23) Each commissioner's duties established by this section expire upon the appointment of the first member of the next redistricting commission. The independent redistricting commission shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.

Provision	Relevant Constitutional History
Article VII, § 1 Method of voting; secrecy	**Original Arizona Constitution (adopted Dec. 9, 1910)**: All elections by the people shall be by ballot, or by such other method as may be prescribed by law; Provided, that secrecy in voting shall be preserved. **No Constitutional Amendments.**
Article VII, § 2 Qualifications of voters; disqualification	**Original Arizona Constitution (adopted Dec. 9, 1910)**: No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, except school elections as provided in Section 8 of this Article, unless such person be a male citizen of the United States of the age of twenty-one years or over, and shall have resided in the State on year immediately preceding such election. **Proposed by Initiative Petition, filed July 5, 1912 (approved election Nov. 5, 1912, eff. Dec. 5, 1912). It replaced Article VII, § 2 in its entirety with the following**: No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be

Provision	Relevant Constitutional History
	submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election. The word "citizen" shall include persons of the male and female sex. The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike. No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights. **Laws 1962, House Concurrent Resolution ("H.C.R.") No. 6 (approved election Nov. 6, 1962, eff. Nov. 26, 1962)**: No person shall be entitled to vote at any general election, or for any office that now

Provision	Relevant Constitutional History
	is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex. The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike. No person under guardianship, non-compos mentis, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

Provision	Relevant Constitutional History
	Laws 2000, H.C.R. No. 2004, § 1, Prop. 101 (approved election Nov. 7, 2000, eff. Nov. 27, 2000). A. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age ~~of twenty-one~~ EIGHTEEN years or over, and shall have resided in the state one year immediately FOR THE PERIOD OF TIME preceding such election AS PRESCRIBED BY LAW, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex. B. The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

Provision	Relevant Constitutional History
	C. No person ~~under guardianship, non compos mentis, or insane~~ WHO IS ADJUDICATED AN INCAPACITATED PERSON shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.
Article VII, § 3 Voting residence of federal employees and certain others	**Original Arizona Constitution (adopted Dec. 9, 1910)**: For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or while a student at any institution of learning, or while kept at any alms house or other asylum at public expense, or while confirmed in any public jail or prison. **Laws 2000, H.R.C. No. 2004, § 2, Prop. 101 (approved election Nov. 7, 2000, eff. Nov. 27, 2000)**: For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of ~~his presence or absence~~ BEING PRESENT OR ABSENT while employed in the service of the United States, or while a student at any institution of learning, or while kept at any ~~alms house or other asylum~~ INSTITUTION OR OTHER SHELTER

Provision	Relevant Constitutional History
	at public expense, or while confined in any public jail or prison.
Article VII, § 7 Highest number of votes received as determinative of person elected	**Original Arizona Constitution (adopted Dec. 9, 1910)**: In all elections held, by the people, in this State, the person, or persons, receiving the highest number of legal votes shall be declared elected. **Laws 1988, S.C.R. No. 1011, Prop. 105 (approved election Nov. 8, 1988, eff. Dec. 5, 1988)**: EXCEPT FOR OFFICES DESIGNATED IN ARTICLE V, SECTION 1, in all elections held, by the people, in this state, the person, or persons, receiving the highest number of legal votes shall be declared elected. **Laws 1991, H.C.R. No. 2001, Prop. 100 (approved election Nov. 3, 1992, eff. Nov. 23, 1992)**: ~~Except for offices designated in article V, section 1~~, In all elections held, by the people, in this State, the person, or persons, receiving the highest number of legal votes shall be declared elected.
Article VII, § 10 Direct primary election law	**Original Arizona Constitution (adopted Dec. 9, 1910)**: The Legislature shall enact a direct primary election law, which provides for the nomination of candidates for all elective, State, county and city

Provision	Relevant Constitutional History
	offices, including candidates for United States Senator and for Representative in Congress. **Laws 1998, S.C.R. No. 1014, Prop. 103 (approved election Nov. 3, 1998, eff. Nov. 23, 1998)**: The Legislature shall enact a direct primary election law, which shall provide for the nomination of candidates for all elective State, county, and city offices, including candidates for United States Senator and for Representative in Congress. ANY PERSON WHO IS REGISTERED AS NO PARTY PREFERENCE OR INDEPENDENT AS THE PARTY PREFERENCE OR WHO IS REGISTERED WITH A POLITICAL PARTY THAT IS NOT QUALIFIED FOR REPRESENTATION ON THE BALLOT MAY VOTE IN THE PRIMARY ELECTION OF ANY ONE OF THE POLITICAL PARTIES THAT IS QUALIFIED FOR THE BALLOT.
Article VII, § 11 General elections; date	**Original Arizona Constitution (adopted Dec. 9, 1910)**: There shall be a general election of representatives in congress, and of state, county, and precinct officers on the first Tuesday after the first Monday in November of the first even numbered year after the year in which

Provision	Relevant Constitutional History
	Arizona is admitted to statehood and biennially thereafter. **No Constitutional Amendments.**
Article VII, § 14 Fee for placing candidate's name on ballot	**Original Arizona Constitution (adopted Dec. 9, 1910)**: No fee shall ever be required in order to have the name of any candidate placed on the official ballot for any election or primary. **No Constitutional Amendments.**
Article VII, § 15 Qualifications for public office	**Original Arizona Constitution (adopted Dec. 9, 1910)**: Every male person elected or appointed to any office of trust or profit under the authority of the State or of any political division of the State, or any male deputy of such officer, shall be a qualified elector of the political division in which said person shall be elected or appointed. **Laws 1912, Official Ballot Nos. 300 and 301 (approved election Nov. 5, 1912, eff. Dec. 5, 1912)**: Every ~~male~~ person elected or appointed to any office of trust or profit under the authority of the state, or any political division ~~of the State~~, or any ~~male deputy of such officer~~ MUNICIPALITY THEREOF, shall be a qualified elector of the political division OR MUNICIPALITY in which said person shall be elected or appointed.

Provision	Relevant Constitutional History
	Laws 1948, H.C.R. No. 5, § 1, Official Ballot Nos. 104-195 (approved election Nov. 2, 1948, eff. Nov. 22, 1948): Every person elected or appointed to any office of trust or profit under the authority of the state, or any political division or any municipality thereof, shall be a qualified elector of the political division or municipality in which said person shall be elected or appointed; PROVIDED, HOWEVER, THAT THIS SECTION SHALL NOT APPLY TO THE CITY MANAGER IN INCORPORATED CITIES OPERATING UNDER A CITY MANAGER FORM OF GOVERNMENT. **Laws 1971, S.C.R. No. 9, § 1, Prop. 102 (approved election Nov. 7, 1972, eff. Dec. 1, 1972)**: Every person elected or appointed to any ELECTIVE office of trust or profit under the authority of the state, or any political division or any municipality thereof, shall be a qualified elector of the political division or municipality in which ~~said~~ SUCH person shall be elected. ~~or appointed; provided, however, that this section shall not apply to the city manager in incorporated cities operating under a city manager form of government.~~

Provision	Relevant Constitutional History
Article VII, § 17 Vacancy in Congress	**Original Arizona Constitution (adopted Dec. 9, 1910)**: § 17 did not exist. **Laws 1961, S.C.R. No. 13, § 1, Prop. 101 (approved election Nov. 6, 1962, eff. Nov. 26, 1962)**: There shall be a primary and general election as prescribed by law, which shall provide for nomination and election of a candidate for United States Senator and for Representative in Congress when a vacancy occurs through resignation or any other cause.
Article VII, § 18 Term limits on ballot appearances in congressional elections	**Original Arizona Constitution (adopted Dec. 9, 1910)**: § 18 did not exist. **Prop. 107 (approved election Nov. 3, 1992, eff. Nov. 23, 1992)**: The name of any candidate for United States senator from Arizona shall not appear on the ballot if, by the end of the current term of office, the candidate will have served (or, but for resignation, would have served) in that office for two consecutive terms, and the name of a candidate for United States representative from Arizona shall not appear on the ballot if, by the end of the current term of office, the candidate will have served (or, but

Provision	Relevant Constitutional History
	for resignation, would have served) in that office for three consecutive terms. Terms are considered consecutive unless they are at least one full term apart. Any person appointed or elected to fill a vacancy in the United States congress who serves at least one half of a term of office shall be considered to have served a term in that office for purposes of this section. For purposes of this section, terms beginning before January 1, 1993 shall not be considered.
Article VII, pt. 1, § 1 Officers subject to recall; petitioners	**Original Arizona Constitution (adopted Dec. 9, 1910)**: Every public officer in the State of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a Recall Petition, demand his recall. **Change required by the United States government as a condition**

Provision	Relevant Constitutional History
	for admission as a state. Approved by electors, Dec. 12, 1911. Every public officer in the State of Arizona, EXCEPT MEMBERS OF THE JUDICIARY, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a Recall Petition, demand his recall. **Laws 1912, Ch. 9, § 1, Official Ballot Nos. 101 and 102 (approved election Nov. 5, 1912, eff. Dec. 5, 1912)**: Every public officer in the State of Arizona, ~~except members of the judiciary~~, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall

Provision	Relevant Constitutional History
	equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a Recall Petition, demand his recall.
Article VIII, pt. 1, § 2 Recall petitions; contents; filing; signatures; oath	**Original Arizona Constitution (as originally adopted, Dec. 9, 1910)**: Every recall petition must contain a general statement, in not more than two hundred words, of the grounds of such demand, and must be filed in the office in which petitions for nominations to the office held by the incumbent are required to be filed. The signatures to such recall petition need not all be on one sheet of paper, but each signer must add to his signature the date of his signing said petition, and his place of residence, giving his street and number, if any, should he reside in a town or city. One of the signers of each sheet of such petition, or the person circulating such sheet, must make and subscribe an oath on said sheet, that the signatures thereon are genuine. **No Constitutional Amendments.**
Article VIII, pt. 1, § 3	**Original Arizona Constitution (adopted Dec. 9, 1910)**: If said officer shall offer his resignation it

Provision	Relevant Constitutional History
Resignation of officer; special election	shall be accepted, and the vacancy shall be filled as may be provided by law. If he shall not resign within five days after a Recall Petition is filed, a special election shall be ordered to be held, not less than twenty, nor more than thirty days after such order, to determine whether such officer shall be recalled. On the ballots at said election shall be printed the reasons as set forth in the petition for demanding his recall, and, in not more than two hundred words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said election shall have been officially declared. **Laws 1973, S.C.R. No. 1022, § 1, Prop. 101 (approved election Nov. 5, 1974, eff. Dec. 5, 1974)**: If ~~said~~ SUCH officer shall offer his resignation it shall be accepted, and the vacancy shall be filled as may be provided by law. If he shall not resign within five days after a Recall Petition is filed AS PROVIDED BY LAW, a special election shall be ordered to be held, ~~not less than twenty, nor more than thirty days after such order~~, AS PROVIDED BY LAW, to determine whether

Provision	Relevant Constitutional History
	such officer shall be recalled. On the ballots at ~~said~~ SUCH election shall be printed the reasons as set forth in the petition for demanding his recall, and, in not more than two hundred words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of ~~said~~ SUCH election shall have been officially declared.
Article VIII, pt. 1, § 4 Special election; candidates; results; qualification of successor	**Original Arizona Constitution (adopted Dec. 9, 1910)**: Unless he otherwise request, in writing, his name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at said election. The candidate who shall receive the highest number of votes, shall be declared elected for the remainder of the term. Unless the incumbent receive the highest number of votes, he shall be deemed to be removed from office, upon qualification of his successor. In the event that his successor shall not qualify within five days after the result of said election shall have been declared, the said office shall be vacant, and may be filled as provided by law.

Provision	Relevant Constitutional History
-	**Laws 1988, S.C.R. No. 1011, Prop. 105 (approved election Nov. 8, 1988, eff. Dec. 5, 1988)**: Unless ~~he~~ THE INCUMBENT otherwise ~~request~~ REQUESTS, in writing, ~~his~~ THE INCUMBENT'S name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at said election. IF THE OFFICE IS ONE DESIGNATED IN ARTICLE V, SECTION 1, THE CANDIDATE WHO RECEIVES A MAJORITY OF THE VOTES CAST IS ELECTED FOR THE REMAINDER OF THE TERM. IF NO PERSON RECEIVES A MAJORITY OF THE VOTES CAST, A SECOND ELECTION SHALL BE HELD AS PRESCRIBED BY LAW BETWEEN THE PERSONS RECEIVING THE HIGHEST AND SECOND HIGHEST NUMBER OF VOTES CAST. THE PERSON RECEIVING THE HIGHEST NUMBER OF VOTES AT THE SECOND ELECTION IS ELECTED FOR THE REMAINDER OF THE TERM. The candidate FOR AN OFFICE WHICH IS NOT DESIGNATED IN ARTICLE V, SECTION 1 who shall receive the highest number of votes; shall be declared elected for the

Provision	Relevant Constitutional History
	remainder of the term. Unless the incumbent receive RECEIVES the ~~highest~~ number of votes PRESCRIBED IN THIS SECTION, ~~he~~ THE INCUMBENT shall be deemed to be removed from office, upon qualification of ~~his~~ THE successor. In the event that ~~his~~ THE successor shall not qualify within five days after the result of said election shall have been declared, the said office shall be vacant, and may be filled as provided by law. **Laws 1991, H.C.R. No. 2001, Prop. 100 (approved election Nov. 3, 1992, eff. Nov. 23, 1992)**: Unless the incumbent otherwise requests, in writing, the incumbent's name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at said election. ~~If the office is one designated in article V, section 1, the candidate who receives a majority of the vote cast is elected for the remainder of the term. If no person receives a majority of the votes cast, a second election shall be held as prescribed by law between the persons receiving the highest and second highest number of votes cast.~~

Provision	Relevant Constitutional History
	~~The person receiving the highest number of votes at the second election is elected for the remainder of the term. The candidate for an office which is not designated in article V, section 1 who shall receive~~ WHO RECEIVES the highest number of votes shall be declared elected for the remainder of the term. Unless the incumbent receives the highest number of votes ~~prescribed in this section~~, the incumbent shall be deemed to be removed from office, upon qualification of the successor. In the event that the successor shall not qualify within five days after the result of said election shall have been declared, the said office shall be vacant, and may be filled as provided by law.
Article VIII, pt. 1, § 5 Recall petitions; restrictions and conditions	**Original Arizona Constitution (as originally adopted, Dec. 9, 1910)**: No recall petition shall be circulated against any officer until he shall have held his office for a period of six months, except that it may be filed against a member of the legislature at any time after five days from the beginning of the first session after his election. After one recall petition and election, no further recall petition shall be filed against the same officer during the term for which he was elected,

Provision	Relevant Constitutional History
	unless petitioners signing such petition shall first pay into the public treasury which has paid such election expenses, all expenses of the preceding election. **No Constitutional Amendments.**
Article XXII, § 12 Election of representative in congress	**Original Arizona Constitution (originally adopted, Dec. 9, 1910)**: One Representative in the Congress of the United States shall be elected from the State at large, and at the same election at which officers shall be elected under the Enabling Act, approved June 20, 1910, and, thereafter, at such times and in such manner as may be prescribed by law. **No Constitutional Amendments.**
Article XXII, § 13 Continuation in office until qualification of successor	**Original Arizona Constitution (originally adopted, Dec. 9, 1910)**: The term of office of every officer to be elected or appointed under this Constitution or the laws of Arizona shall extend until his successor shall be elected and shall qualify. **No Constitutional Amendments.**
Article XXII, § 18 Nomination of incumbent public	**Original Arizona Constitution (originally adopted, Dec. 9, 1910)**: A State Examiner, who shall be a skilled accountant shall be appointed by the Governor, by

Provision	Relevant Constitutional History
officers to other offices	and with the advice and consent of the Senate, for a term of two years. The State Examiner shall examine the books and accounts of such public officers, and perform such other duties, and have such other powers, as may be prescribed by law. **Repealed by Laws 1968, H.C.R. No. 2, Official Ballot No. 107 (approved election Nov. 5, 1968, eff. Dec. 4, 1968)** **Laws 1980, S.C.R. No. 1002, Prop. 100 (approved election Nov. 4, 1980, eff. Nov. 24, 1980)**: Except during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, State or federal office.

APPENDIX B: Statutes Regulating Elections Passed or Amended by Initiative

Initiative	Summary/Relevant Legislative History
The Motor Voter Initiative **A.R.S. § 16-111** Definitions **A.R.S. § 16-112** Driver license voter registration	**Summary of Initiative**: allowing a person who is applying for a driver license or renewal to also, at the same time and place, register to vote. The proposition delegates to the Director of the Department of Transportation and Secretary of State, after consultation with county recorders, the authority to implement a system of permitting driver's license applicants to register to vote. **Legislative History**: Added by Initiative Petition, Proposition ("Prop.") 202 (approved election Nov. 2, 1982, eff. Nov. 30, 1982).
The Campaign Contribution Limit Initiative **A.R.S. § 16-905** Contribution limitations; civil penalty; complaint; reductions	**Summary of Initiative**: limiting campaign contributions, providing for penalties and removal from office for violation of campaign contribution provisions, and prescribing definitions for Chapter 6 of Title 16.

	Legislative History: Added by Initiative Petition, Prop. 200 (approved election Nov. 4, 1986, eff. Dec. 16, 1986).
The Citizen Clean Elections Act Initiative **A.R.S. § 16-940 to -961** **A.R.S. § 16-901.01** Limitations on certain unreported expenditures and contributions	**Summary of Initiative**: establishing a system for public funding of election campaigns for political candidates who voluntarily participate in a system to limit campaign spending and fundraising in statewide and state legislative election. The proposition also reduces by twenty percent the amount per individual that can currently be contributed to a candidate if they opt not to receive the public funding. It further establishes a Citizens Clean Election Commission that consists of five members, appointed by both the Governor and the highest ranking statewide officeholder who is not from the same political party as the Governor. The Commission enforces and administers the clean elections system. **Legislative History**: Title 16, Chapter 6, Article 2, consisting of §§ 16-940 to -961, and A.R.S. § 16-901.01 were added by Initiative Petition,

	Prop. 200, (approved election Nov. 3, 1998, eff. Nov. 23, 1998).
The Arizona Tax Payer and Citizen Protection Act Initiative **A.R.S. § 16-152** Registration form **A.R.S. § 16-166** Verification of registration **A.R.S. § 16-579** Procedure for obtaining ballot by elector	**Summary of Initiative Amendment**: revising the voter registration form to require a statement that the applicant shall submit evidence of United States citizenship with the application and that the registrar shall reject the application if no evidence of citizenship is attached. It further requires electors to present a valid form of identification before receiving a ballot. **Legislative History**: A.R.S. §§ 16-152, -166 and -579 amended by Initiative Petition, Prop. 200 (approved election Nov. 2, 2004, eff. Dec. 8, 2004).

AMICUS CURIAE BRIEF

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Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF FOR AMICI CURIAE THOMAS MANN AND NORMAN ORNSTEIN IN SUPPORT OF APPELLEES

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BRIEF FOR AMICI CURIAE THOMAS MANN AND NORMAN ORNSTEIN IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST[1]

Amici curiae are political scientists who have studied, analyzed, and written extensively on issues related to redistricting, partisanship in American politics, and possible avenues of reform.

Thomas E. Mann is Senior Fellow in Governance Studies at the Brookings Institution, and Resident

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs in this case.

Scholar at the Institute of Governmental Studies, University of California, Berkeley. He is the author of numerous scholarly articles and opinion pieces on various aspects of American politics, including election law and reform. His writings on redistricting include "Polarizing the House of Representatives: How Much Does Gerrymandering Matter?" in *Red and Blue Nation? Characteristics and Causes of America's Polarized Politics*, edited by Pietro S. Nivola and David W. Brady (2006). He co-edited *Party Lines: Competition, Partisanship and Congressional Redistricting* (2005) with Bruce Cain, to which he also contributed a chapter entitled "Redistricting Reform: What is Desirable? Possible?"

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research, where he has served as co-director of the AEI-Brookings Election Reform Project. He is a regular contributor to the *National Journal* and *The Atlantic*, as well as an election analyst for BBC News. He is also Project Director of the American Academy of Arts and Sciences initiative, "Institutions and the Common Good."

Together, *amici* have published two bestselling books on contemporary American politics: *The Broken Branch: How Congress is Failing America and How to Get it Back on Track* (2008), and *It's Even Worse Than it Looks: How the American Constitutional System Collided With the New Politics of Extremism* (2012). They have also co-authored numerous articles and opinion pieces on topics relating to American political reform, including campaign finance and congressional redistricting. And they have appeared as *amici* before this Court

in a number of recent cases involving election law issues, including two involving challenges to congressional redistricting.[2]

Amici have studied redistricting and its relationship to partisan politics in depth, and have contributed to the public debate on possible avenues of reform. They have a substantial interest in the States' continuing ability to act as laboratories of democracy in developing solutions—including independent redistricting commissions like Arizona's—to the pernicious effects of partisan gerrymandering. *Amici* therefore respectfully offer their views to aid the Court in this case.

SUMMARY OF ARGUMENT

This case presents the Court with a rare opportunity to assess whether the States may decide for themselves how best to realize the promise of representative democracy.

States enjoy considerable autonomy in deciding when and how to draw congressional districts, subject only to a few constitutional and statutory limitations. But when the district-drawing process is controlled by elected officials, the result too often is a process dominated by self-interest and partisan manipulation. The consequences are twofold: diminished electoral competition, which insulates Representatives from their constituents; and an increasingly polarized Congress that takes cues from the

---

[2] *See League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006) ("*LULAC*"), and *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004).

most extreme and politically active partisans, with little incentive to compromise.

Recognizing these pernicious effects and the conflict of interest inherent in legislative redistricting, many States have sought a better path through the use of redistricting commissions. In some, citizen or politician commissions offer non-binding advice on redistricting or step in when elected officials fail to agree on a plan. In others, including Arizona, voters have entrusted redistricting to independent, non-political commissions through ballot measures and constitutional amendments. These popular referenda deserve this Court's respect.

By insulating redistricting decisions from direct partisan influence, commissions like Arizona's offer a crucial first step toward breaking the cycle of partisanship and dysfunction perpetuated by legislative gerrymandering. The States' efforts to use such commissions to tackle one of America's most intractable political problems have great potential and are fully consistent with the States' traditional role as laboratories of democracy. This Court should not stand in their way.

ARGUMENT

I. GERRYMANDERING DISTORTS THE DEMOCRATIC PROCESS.

Every ten years, the completion of a new census ushers in a flurry of redistricting activity across the country. Using the results of the latest census, the President allocates to each State its proportional share of the 435 voting members of the House of

Representatives.[3] 2 U.S.C. § 2a(a); U.S. Const. art. I, § 2, cl. 3. By federal law, the States must assign each Representative to a unique district.[4] 2 U.S.C. § 2c. Under this Court's Equal Protection Clause jurisprudence, those districts must be as close as possible to equal in population. *See Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964). So, with each new recorded shift in population, the nation's electoral maps must be redrawn.

Aside from a few limitations, the States are relatively free to redistrict however, and however often, they like.[5] But when elected officials are given the

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[3] The number of Representatives was fixed by statute in 1911, ultimately resulting in a total of 435 voting members. Act of Aug. 8, 1911, ch. 5, Pub. Law 62-5, 37 Stat. 13 (1913). The number of Representatives temporarily increased to 437 when Alaska and Hawai'i were admitted as States, but the number was reset to 435 after the 1960 census. Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 345 (1958); Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 8 (1959).

[4] Congress has, over time, enacted and repealed a range of regulations over congressional districting pursuant to its authority under the Elections Clause to "make or alter" regulations concerning the "times, places and manner of holding elections" for national office. *See Vieth*, 541 U.S. at 276-277 (plurality opinion); U.S. Const. art. I, § 4.

[5] Some States allow redistricting twice in a decade, or more. *See generally*, Justin Levitt and Michael P. McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 Geo. L.J. 1247 (2007). For example, the constitutions of South Carolina and Wyoming expressly permit congressional redistricting at any time. *See* S.C. Const. art. VII, § 13; Wyo. Const. art. III, § 49. In the 2000 redistricting cycle, both Texas and Colorado carried out mid-decade redistricting, although the Colorado legislature's effort was ultimately overturned by the state's Supreme Court. *See*

pen, self-dealing and partisanship enter into the process and, too often, dominate it. For over two hundred years, the worst excesses of these distortions have gone by a colorful name: the gerrymander.[6]

A. The Congressional Redistricting Process And The Modern Gerrymander.

1. The States' constitutional authority to apportion congressional seats is subject only to two substantive federal constraints and to a number of "traditional" criteria, which have been recognized by this Court, but are not required by federal law.

The first federal criterion is population equality. In a series of decisions in the 1960s, the Court explained the principle that congressional districts should be drawn to ensure "equal representation for equal numbers of people." *Wesberry*, 376 U.S. at 18. To allow unequal districts, the Court reasoned, would dilute the power of individual votes and violate the Equal Protection Clause's implicit guarantee of "one person, one vote." *Id.* at 18; *see Reynolds* v.

LULAC, 548 U.S. 399 (Texas); *People ex rel. Salazar* v. *Davidson*, 79 P.3d 1221 (Colo. 2003) (Colorado).

[6] "Gerrymander" is a portmanteau inspired by a Massachusetts legislative district shaped like a salamander. The district was drawn under the governorship of Elbridge Gerry in 1812 by Jeffersonian Republicans in the state legislature. A cartoon depicting the map with wings and fangs appeared in the March 26, 1812 issue of the *Boston Gazette* under the headline, "The Gerry-mander. A new species of *Monster*, which appeared in *South Essex District* in January last." *See* American Treasures of the Library of Congress, available at: http://goo.gl/kIhS3A (last visited Jan. 22, 2015).

Sims, 377 U.S. 533 (1964) (applying the principle to state legislatures); *Gray* v. *Sanders*, 372 U.S. 368 (1963) (statewide offices).

The second federal criterion, the Voting Rights Act, 52 U.S.C. § 10301, *et seq.*[7], builds on the first: it applies the Equal Protection Clause's guarantee to provide enhanced protection against the dilution of minority votes. Section 2 of the Act prohibits, among other things, any measure that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). The Act's practical effect on redistricting is a controversial and heavily litigated matter. *See, e.g.*, *LULAC*; *Bush* v. *Vera*, 517 U.S. 952 (1996); *Shaw* v. *Reno*, 509 U.S. 630 (1993). But it means at least that States may not draw districts in such a way that minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b); *see Abrams* v. *Johnson*, 521 U.S. 74, 90-91 (1997) (setting out the test for claims of vote dilution under section 2); *cf. LULAC*, 548 U.S. at 428 (section 2 guarantees "equality of opportunity, not * * * electoral success for minority-preferred candidates of whatever race").

The Court has also explicitly recognized several "traditional" redistricting criteria. These include "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests." *Miller* v. *Johnson*, 515 U.S. 900,

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[7] Former 42 U.S.C. § 1973 has been transferred to title 52 and renumbered section 10301.

916 (1995). Compactness depends broadly on a district's geometric shape. *See* Justin Levitt, *A Citizen's Guide to Redistricting* 51 (2010) ("*Citizen's Guide*"). Scholars have proposed dozens of ways of measuring compactness, focusing on metrics ranging from the straightness of a district's boundary lines to the degree to which it is spread out.[8] Nineteen States expressly consider compactness when drawing district lines. *See* Justin Levitt, *All About Redistricting*.[9]

Contiguity refers to the geographical interconnection of the district—i.e., whether a person could travel from any point in the district to any other point without crossing its boundary. *Citizen's Guide* at 50. Twenty-three States make contiguity a priority in redistricting, whether by statute or guideline. *See All About Redistricting, supra.*

Nineteen States prioritize respect for political boundaries, like municipal, taxing-district, and county lines. In application, this criterion varies in focus from neighborhoods, in California, to counties, in Alabama. *See id.*; *Citizen's Guide* at 54-55.

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[8] Among the most recognized are the Polsby-Popper, Reock, and Convex Hull measures. *See* Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & P. Rev. 301 (1991); Ernest C. Reock, Jr., *A Note: Measuring Compactness as a Matter of Legislative Apportionment*, 5 Midwest J. Pol. Sci. 70 (1961); Richard G. Niemi, Bernard Grofman, Carl Carlucci, and Thomas Hofeller, *Measuring Compactness and the Role of the Compactness Standard in a Test for Partisan and Racial Gerrymandering* 52 J. Pol. 1155 (1990).

[9] *Available at:* http://goo.gl/VSmbSe (last visited Jan. 22, 2015).

Finally, fourteen States consider communities of shared interests in redistricting. *See All About Redistricting*. These can include "[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation." *Id.* (citing Kansas guidelines).

2. Within these broad constraints and guidelines, States are free to draw congressional district lines as they see fit. Unfortunately, this freedom leaves ample opportunity for what Justice Fortas called "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). Although purely partisan gerrymanders may present a justiciable question, *see Davis* v. *Bandemer*, 478 U.S. 109 (1986), this Court has not announced the standard that would apply to such a challenge. *See, e.g.*, *Vieth*, 541 U.S. at 292 (plurality opinion). Nor have the States, in large numbers, prohibited partisan gerrymandering: Only eight States expressly forbid line drawing that "unduly" favors a particular candidate or party. *See All About Redistricting*, *supra*.

Thirty-five States permit district mapmakers to consider electoral outcomes. *Id.*[10] When they do so, they use three techniques—"cracking," "packing," and "tacking"—to enhance the position of the party, candidate, or group whose electoral fortunes they

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[10] This number excludes the eight States that prohibit partisan line-drawing and the seven States that have only one congressional district (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming).

wish to improve. *See Citizen's Guide* at 57. Cracking "involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts." *Vieth*, 541 U.S. at 286 n.7 (plurality opinion). Packing "refers to the practice of filling a district with a supermajority of a given group or party." *Id.* Packing might ensure a safe seat, but it can also concentrate groups that would otherwise have a majority in several districts into just one, thereby limiting their influence overall. *See Voinovich* v. *Quilter*, 507 U.S. 146, 153-154 (1993). Tacking is the practice of expanding the borders of an existing district to bring in members of a particular group from a neighboring district. *See Citizen's Guide* at 58; *Bradas* v. *Rapides Parish Police Jury*, 508 F.2d 1109, 1113 (5th Cir. 1975).

Together, cracking, packing, and tacking allow redistricting authorities to choose the voters who will elect the next Representative from a given district. By shoring up or diluting the influence of different groups, these techniques serve to protect or imperil incumbents by altering the makeup of the constituents they are elected to serve.

3. Gerrymandering has long been a source of concern. Justice Scalia has traced its roots to the early eighteenth century. *Vieth*, 541 U.S. at 274-275 (plurality opinion). But the long heritage of the problem does not make it less damaging or less urgently in need of reform. Indeed, by at least one measure, redistricting is more controversial than ever: The latest cycle, following the 2010 census, has already spawned some 214 lawsuits challenging the legality of congressional and state legislative district maps. *All About Redistricting*, *supra*, Litigation in

the 2010 Cycle.[11] And the post-2000 cycle that preceded it offered two vivid illustrations—one from each side of the political aisle—demonstrating just how entrenched partisan gerrymandering has become.

California. In 2001, thirty Democratic members of California's congressional delegation hired a redistricting consultant to design "safe" districts. One congresswoman told reporters: "Twenty thousand is nothing to keep your seat[.] I spend $2 million every election. If my colleagues are smart, they'll pay their $20,000 and [the consultant] will draw the district they can win in." Hanh Quach and Dena Bunis, *All Bow to Redistrict Architect*, O.C. Register (Aug. 26, 2001); James Sterngold, *New Map Helps Democrats Tighten Grip on California*, N.Y. Times (Sept. 1, 2001) (commenting that the State's map "all but guarantees a big Democratic majority in the delegation for perhaps the next decade"); *see Cano* v. *Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002) (dismissing a related equal protection challenge) *aff'd*, 537 U.S. 1100 (2003). The plan worked: in the 2004 elections, not one state legislative or congressional seat changed parties, and not one incumbent failed to be re-elected. John Wildermuth, *Some Suspect Governor's Plan to Redraw District Lines*, S.F. Chron. (Jan. 2, 2005). The Democratic majority remained intact.

Texas. When Republicans gained control of the Texas legislature in 2003, they re-drew the State's congressional district map to give Republicans an

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[11] *Available at*: http://goo.gl/scF1Gr (last visited Jan. 22, 2015).

edge in the House of Representatives. After a dramatic showdown with Democratic legislators—who fled the State in an attempt to deprive Republicans of a quorum—the Republican plan passed. *LULAC*, 548 U.S. at 411-413 (opinion of Kennedy, J.). In the round of elections that followed, Republicans saw a six-seat gain in Texas' congressional delegation. *Id.* at 412-413. In a consolidated appeal, five Justices of this Court could not agree on a standard to evaluate claims that the Republican plan constituted an illegally partisan gerrymander. *Id.* at 423 (opinion of Kennedy, J.). But the Court did conclude that one of the newly drawn districts had "cracked" the Latino vote in order to protect an incumbent Republican, in violation of the Voting Rights Act. *Id.* at 442.

In light of blatant gerrymanders like these, it should come as no surprise that voters in both Arizona and California approved ballot measures since 2000, creating independent commissions intended to emancipate the redistricting process from partisan politicking.

B. Gerrymandering Both Reflects And Perpetuates Political Dysfunction.

Because redistricting is conducted by the legislature itself in most States, it reflects the partisan and political dynamics of those legislatures. And because redistricting has "the ability to shift the terrain on which all future political activity is negotiated," it also risks reinforcing those dynamics. Justin Levitt, *Weighing the Potential of Citizen Redistricting*, 44 Loy. L.A. L. Rev. 513, 518 (2011); *see* Thomas E. Mann, "Polarizing the House of Representatives" in *Red and Blue Nation?* 280 (Pietro S. Nivola and David W. Brady, eds. 2006) ("*Red and Blue Nation*").

The result over the past twenty years has been an overall decline in electoral competition, and a corresponding entrenchment of partisan behavior by Representatives: Elected to districts fixed to ensure their success, they have little incentive to seek compromise or to challenge the party line. *See* Thomas E. Mann and Norman J. Ornstein, *The Broken Branch* 230 (2008).

1. One of the clearest trends in congressional politics over the last several decades has been a decline in electoral competition. In the four elections leading up to the 2004 election cycle, congressional incumbents were reelected an unprecedented 97.9 percent of the time. Richard H. Pildes, *Why the Center Does Not Hold*, 99 Cal. L. Rev. 273, 309 (2011). The 2002 elections were less competitive than any over the preceding three decades. *Id.* at 309-310; *see* Samuel Issacharoff and Jonathan Nagler, *Protected From Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 Ohio St. L. J. 1121, 1123-24 (2007). This downward trend has become even more pronounced in recent years, but it is not a new phenomenon; the number of competitive congressional races has been in decline since at least the post-war period. Issacharoff and Nagler, *Protected from Politics* 1125; *see* Mann, "Polarizing the House of Representatives," at 268-269 (noting the trend since the turn of the twentieth century).

Gerrymandering has played a role in this decline of competition for congressional seats. Mann, "Polarizing the House of Representatives," at 274; *see* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Elec. L. J. 179, 184

(2003) (arguing that redistricting "largely explain[s]" incumbent successes in the 2002 election).

Here's how it works: Ordinarily, voters are supposed to choose their elected officials. But when a district is drawn to benefit a particular candidate, party, or group, redistricting effectively allows the elected officials to choose their own voters. Partisan manipulation of the redistricting process creates "safe seats," insulating Representatives from changes in voter preferences. This insulation, in turn, dampens congressional responsiveness: Representatives are less responsive to their constituency as a whole, and are more focused instead on the views of the most partisan, most politically active minority.

Gerrymandering thus turns on its head the Framers' notion that the House of Representatives should be "so constituted as to support in the members an habitual recollection of their dependence on the people." The Federalist No. 57 (Alexander Hamilton or James Madison); *see* The Federalist, No. 52 (Alexander Hamilton or James Madison). And it has rightly been condemned by this Court. *See Reynolds*, 377 U.S. at 565 (gerrymanders that permit minority control "deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result"); *Vieth*, 541 U.S. at 361 (Breyer, J., dissenting) ("The democratic harm" of such "unjustified entrenchment" of incumbents is "obvious.").

One recent study concluded that "the power of the gerrymander has been used to build up the electoral flood walls so that only a significant storm surge of popular opinion can have any discernible effect" on Congress. Issacharoff and Nagler, *Protected from*

Politics at 1131. In other words, having set the stage on which elections will be contested for a decade, the dominant political party may retain control over Congress, even as it loses majority popular support. *See* Hirsch, *The United States House of Unrepresentatives*, 2 Elec. L. J. at 202-204. This certainly is not what the Framers had in mind when they established a House characterized by its "immediate dependence" on the people. *See* The Federalist No. 52.

2. As competition over congressional seats has dropped to all-time lows, political polarization has soared to new heights. Over the last twenty years, the number of Americans with consistently liberal or conservative views has doubled, and the ideological overlap between the parties has diminished. Pew Research Ctr., *Political Polarization in the American Public* 6, 19-21 (June 2014). As the ideological poles have grown in size and grown further apart, the center—comprised of Americans with mixed political views—has shrunk, from approximately half of the population in 1994 and 2004 to 40 percent in 2014. *Id.* at 9. And the growing divide has also become more personal. Those with the most ideologically consistent views are now far more likely to express antipathy for supporters of the other party than at any other time in the last twenty years. *Id.* at 32-35.

Together, the decline in electoral competition and the growth of partisanship in the population at large contribute to increasingly partisan behavior in Congress. Districts that are dominated by supporters of a particular party, whether by virtue of gerrymandering or not, elect Representatives that reliably cast more partisan votes in the House. Mann, *Polar-*

izing the House of Representatives 275-276. These Representatives are naturally incentivized to respond primarily to the relatively small, politically-engaged extremes of their parties. *See Political Polarization in the American Public* 40-41; *cf.* Alan I. Abramowitz and Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. Pol. 542, 553-554 (2008) ("[I]t is mainly the least interested, least informed and least politically active members of the public who are clustered near the center of the ideological spectrum.").

Gerrymandering's intra-party dynamics only exacerbate this problem. Because Representatives must rely on their co-partisans in state legislatures to design favorable districts on their behalf, legislative redistricting reinforces partisan rigidity by making it more costly for legislators to break step with party orthodoxy. That dependence further saps the House of Representatives of its deliberative vigor, Mann and Ornstein, *It's Even Worse Than it Looks* 145, and undermines the legitimacy of the Congress and its work. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 684-685 (2013).

The result is that Representatives increasingly find themselves in the partisan equivalent of an echo chamber—districts drawn on party lines assure them of electoral success without the need for cross-party compromise, and the increasing zeal of their most active constituents—the only voters to whom they feel accountable—pushes them into a contest for partisan orthodoxy within their parties.

Although this trend cannot be explained purely by gerrymandering, redistricting reform can play an important part in containing it. This Court suggested as much twenty years ago in *Shaw* v. *Reno*, when

it observed in the context of race-based gerrymandering, that "reapportionment is one area in which appearances do matter." 509 U.S. at 647. When districts are drawn according to the perceived group characteristics of their inhabitants, it sends a message to elected officials that "their primary obligation is to represent only the members of th[e majority] group, rather than their constituency as a whole. This is altogether antithetical to our system of democracy." *Id.* at 648. It is no less antithetical to our democracy when the line-drawing in question is done for political, rather than racial, reasons. By reducing the role of partisan alignment in redistricting decisions, reform can begin to change Representatives' perceptions of their own roles and improve their responsiveness to the electorate as a whole.

II. INDEPENDENT COMMISSIONS LIKE ARIZONA'S REPRESENT A CRUCIAL AVENUE OF REFORM.

The basic problem with legislative control over redistricting is obvious: Legislators' personal and partisan interests are inherently in conflict with the ideals of electoral fairness and representative parity. That danger was not lost on James Madison, who cautioned that legislators empowered to regulate elections would have "a personal interest distinct from that of their Constituents" that would undermine the alignment of interests crucial to the functioning of representative democracy. Max Farrand, ed., 2 *Records of the Federal Convention of 1787*, at 249-250 (1911).

That conflict has proven to be so evident in practice that four Justices of the Court in *Davis* v. *Bandemer* were prepared to accept it as a given, observing that

"[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." 478 U.S. at 129 (White, J., joined by Brennan, Marshall, and Blackmun, JJ.).

It is therefore not surprising that calls for reform of the redistricting process have long focused on alternatives to the traditional model of leaving redistricting decisions entirely in the hands of state legislators. These alternatives vary in their degree of insulation from partisan pressures and in the extent of their control over the redistricting process, but they all share the goal of reducing partisan influence over redistricting.

Although no institution can alone address the most entrenched political dysfunction, these initiatives are promising experiments in democracy that offer invaluable examples to the nation as a whole. As Justice Brandeis noted: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." *See New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *cf. Lucas* v. *Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 752 (1964) (Stewart, J., dissenting) (citing Justice Brandeis's dissent in the context of a challenge to state legislative redistricting procedures).

A. States Have Employed A Range Of Mechanisms To Mitigate Partisan Influence In Legislative Redistricting.

Although state legislatures retain primary responsibility for redistricting in most States, at least

fourteen States have adopted some form of commission to play a role in congressional redistricting. Seven of those States have what are known as "assistive commissions," which aid the legislature in carrying out that responsibility.[12] *See generally* All About Redistricting, *supra*[13] These "assistive" commissions take two basic forms: advisory commissions, which provide non-binding guidance to the legislature; and back-up commissions, which step in and take over the process if the legislature fails to reach an agreement.

Advisory commissions operate in five States. In Maine, Ohio, and Rhode Island,[14] panels comprising both legislators and members of the general public recommend redistricting plans to the legislature. *See* Me. Rev. Stat. tit 21-A, § 1206; Ohio Rev. Code § 103.51; 2011 R.I. Laws ch. 106, § 1. More robust advisory commissions assist the legislatures in Iowa and New York. Iowa maintains two advisory bodies, one comprised of ordinary citizens selected by legislative leaders, and one made up of civil servants. *See* Iowa Code §§ 42.5-42.6. The latter drafts redistricting plans according to statutory criteria, turning to the former for input where the criteria leave room for

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[12] This brief addresses only congressional redistricting; States do not necessarily use the same institutions to handle state legislative redistricting.

[13] *Available at*: http://goo.gl/Haf9kY (last visited Jan. 22, 2015).

[14] The statute establishing Rhode Island's commission requires the commission to report its findings by January 15, 2012. *See* 2011 R.I. Laws ch. 106, § 4. Unless the commission is reauthorized by the State's legislature, that language suggests that its work may be limited to the 2010 redistricting cycle.

discretion. These commissions' proposals must be accepted or rejected by the state legislature as-is, unless the legislature is unable to approve two successive proposals, in which case legislators may make modifications to achieve agreement. Voters in New York recently established by ballot initiative a citizen commission with similar responsibilities—the commission must hold public hearings and draw district maps, subject to the same take-it or leave-it rule used in Iowa. *See* New York State Board of Elections, 2014 General Election Proposal Number One, An Amendment.[15]

Back-up commissions operate in two other States, Connecticut and Indiana, to supplement legislative efforts. In Connecticut, if the legislature is unable to agree on new district lines within a year after the decennial census, the governor is directed to establish an eight-member commission of legislators with authority to enact its own plan. Conn. Const. art. III, § 6. Likewise, in Indiana, a five-member legislative commission takes over responsibility for drawing district lines any time the full legislature is incapable of doing so. Ind. Stat. § 3-3-2-2. In both cases, once the commission is activated, it has the final word on redistricting, without any further involvement by the state legislature. *Id.*; Conn. Const. art. III, § 6.

Other States continue to experiment with new reforms. During the 2010 redistricting cycle, for example, then-Governor Bob McDonnell of Virginia used his executive authority to establish a temporary

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[15] *Available at*: http://goo.gl/lEuvJQ (last visited Jan. 22, 2015).

commission to make non-binding recommendations to the state legislature. Va. Exec. Order No. 31 (Jan. 10, 2011).

Advisory and backup commissions each seek to address the political distortions of redistricting in their own way. Advisory commissions create a valuable layer of institutional separation between the people who actually draft district maps and the legislators who must eventually approve them: Although the legislatures in Ohio, Rhode Island, and Virginia are free to modify their commissions' proposed plans, they do not work from a blank slate, and it becomes politically more difficult for them to justify departing from the proposed plan. And while backup commissions do not ordinarily affect redistricting, they exist precisely so that partisan deadlock will not be allowed to derail the process.

Of course, these "assistive" commissions do not eliminate the inherent conflict of interest responsible for gerrymandering because they do not supplant the role elected officials play in redistricting. Thus, they do not displace the mechanisms that allow "insiders [to] capture and manipulate the very processes from which they draw their legitimacy." Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. at 684-685. That is why, as discussed in detail below, seven other States, including Arizona, entrust congressional redistricting entirely to independent commissions.[16]

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[16] The other six are California, Cal. Const. art XXI, § 2; Hawaii, Haw. Const. art IV, § 9; Idaho, Idaho Const. art III, § 2; Montana, Mont. Const. art V, § 14; New Jersey, N.J. Const. art. IV, § III; and Washington, Wash. Const. art. III, § 43.

B. Independent Commissions Like Arizona's Are Among The Most Promising Means To Address The Legislative Conflict Of Interest Responsible For Corrosive Gerrymanders.

Independent commissions represent the next logical step in these important reforms: They place redistricting decisions outside of the partisan political process, mitigating the conflict of interest inherent in legislative redistricting. In so doing, they begin to roll back the destructive dynamics of reduced electoral competition and increased insulation of Representatives.

Arizona's commission, established in 2000 by ballot initiative, *see* JA17-18, is among the most promising of these alternative institutions, but it hardly stands alone. One or more States have established such a commission in each of the last four decennial redistricting cycles. *See* Arizona (2000); California (2008); Hawaii (1978)[17]; Idaho (1994); Montana (1984)[18]; New Jersey (1995); Washington (1984). And the idea is not new; as early as 1893, one commentator sug-

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[17] Although Hawai'i first established an independent commission in 1968, the commission dealt only with state legislative redistricting until 1978, when the State's new constitution expanded the commission's duties to include congressional redistricting. *See* Craig Kugisaki, *Article III: Reapportionment in Hawaii*, Hawaii Constitutional Convention Studies 79-83 (1978); Haw. Const. art. IV, § 9.

[18] Although Montana's constitution provides for an independent commission to draw both state legislative and congressional districts, the State is currently apportioned just one Representative, so it has only one congressional district.

gested that if "each State [chose] by popular vote a commission whose duty it should be to divide the States into congressional districts * * * * [I]t is hardly conceivable that it could produce worse gerrymandering than the present method." John Haynes, *The Merging of National and State Politics*, 2 Yale L.J. 151, 156 (1893).

1. Arizona's Independent Redistricting Commission ("AIRC") shares a number of key features in common with its counterparts, each aimed at reducing the risk of partisan gerrymandering. These include restrictions on who may serve as a commissioner, including limitations on the formal role of elected officials in the commission's work, as well as substantive guidelines on how districts should be drawn. Three of the state commissions, including the AIRC, also incorporate legislative input in the redistricting process.

a. Independent-commission States generally restrict the role that elected officials or putative candidates may play in the redistricting process. Arizona, California, Idaho, Montana, and Washington expressly bar elected officials from sitting on their commissions.[19] Nor can commissioners jump immediately to elected office (and run in the districts they created) once their work is complete; commissioners are generally barred from holding office for some period of time.[20] Even where partisan officials select

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[19] Ariz. Const. art. IV, pt. 2, § 1; Cal. Const. art. XXI, § 2(c)(6); Idaho Const. art. III, §§ 2(2), (6); Mont. Const. art. V, § 14(2); Wash. Const. art. III, § 43(3) and RCW 44.05.030(3).

[20] *See* Ariz. Const. art. IV, pt. 2, § 1(13) (three years); Cal. Const. art. XXI, § 2(c)(6) (ten years for elective office; five years

some or most of the commissioners—as they do in six States, including Arizona—the chair of the commission is chosen separately by the other members.[21]

b. In addition to these structural features, most independent-commission States, including Arizona, also provide substantive guidelines for the redistricting process; indeed, Arizona constrains its commission's discretion to an even greater degree than do its counterparts. The Arizona state constitution directs commissioners to begin by drawing a "grid-like pattern" of districts of equal population, without considering any party registration or voting history data. Ariz. Const. art IV, pt. 2, §§ 1(14), (15). Once the initial grid is complete, the commission may adjust it to comply with federal law, and to accommodate the "traditional" redistricting criteria, including maintaining compactness and contiguity, and preserving communities of interest. *Id.* at § 1(14). The commission is also directed to respect "visible geographic features" and political boundaries, and to favor competitive districts. *Id.* Voting and registration data are permitted to play a role in these adjustments, but the residences of incumbents or candidates may not. *Id.* at § 1(15). Although other independent-commission States impose some degree of substantive guidance, only Arizona imposes a

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for appointive office); Haw. Const. art IV, § 2 (two election cycles); Ida. Const. art. III § 2(6) *and* Idaho Stat. § 72-1502 (five years).

[21] Ariz. Const. art. IV, pt. 2, § 1(8); Haw. Const., art V, § 2; Mont. Const. art. V, § 14(2) *and* Mont. Code § 5-1-102(1); N.J. Const. art. II, § II(1); Wash. Const. art. III, § 43(2).

constitutional requirement to start from a neutral grid.[22]

c. With these structural and substantive constraints in place, most independent-commission States leave redistricting to the commissioners alone. But Arizona is one of three independent-commission States that expressly contemplate a role for the legislature in the commission process. In that respect, the AIRC is far from being the "radical departure" from the traditional redistricting model that Appellant claims. App. Br. 41. Nor does the AIRC "wholly deprive the state legislature of any meaningful role," as *amicus* National Conference of State Legislatures claims, NCSL *Amicus* Br. 14. On the contrary: Not only do legislators participate in the selection of Commission members, but Arizona, like Montana, specifically provides the legislature an opportunity to "comment" on the Commission's proposed plan. *See* Ariz. Const. art IV, pt. 2, § 1(16); Mont. Const. art. V, § 14(2). Washington, the third commission State that contemplates the legislature's involvement in the redistricting process, allows legislators to amend a redistricting plan enacted by the commission by a two-thirds vote within thirty days of the legislative session immediately following the conclusion of the commission's work. Wash. Const. art. III, § 43(7).

In the four other States with commissions, the legislature's role is informal or nonexistent. *See, e.g.*, Bruce E. Cain, *Redistricting Commissions: A Better*

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[22] *See* Cal. Const. art. XXI, § 2(d); Haw. Stat. § 25-2(b); Idaho Stat. § 72-1506; Wash. Const. art III, § 43(5).

Political Buffer?, 121 Yale L.J. 1808, 1838 (2012) (describing the practice of New Jersey's commission, which invites partisan delegations to present competing proposals).[23]

Taken together, these structural features balance the need to avoid legislative conflicts of interest with the recognition that every redistricting decision represents important tradeoffs.

2. The AIRC avoids the political distortions of the traditional legislative model of redistricting in at least two crucial respects. First, because the AIRC is the product of a ballot initiative, its composition and the guidelines it must follow directly reflect the will and values of the State's voters, rather than the result of political bargaining among self-interested officeholders. Second, the AIRC's structural independence from partisan influence insulates it from the conflict of interest primarily responsible for gerrymandering.

As a result, the Commission has been able to produce relatively neutral district maps without overtly favoring either incumbents or parties. *See* David Lublin and Michael P. McDonald, *Is It Time to Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 Election L.J. 144, 152

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[23] Indeed, although the NCSL acknowledges that the commissions in place in Hawaii, Idaho, Montana, New Jersey, and Washington preserve "a substantive role" for the legislature in redistricting, the only distinction the NCSL can point to between those commissions and the AIRC, is that in Arizona, unlike these other five States, the members of the commission are appointed "from a predetermined list." NCSL Br. at 10; *see also id.* at 4-5.

(2006) (assessing state legislative districts, which are also drawn by the AIRC). And the Commission has enjoyed some success in increasing the level of competition in congressional elections. *See* Thomas E. Mann, "Redistricting Reform: What is Desirable? Possible?" in Thomas E. Mann and Bruce E. Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting* 107 (2005). *But see* Lublin and McDonald, *Is It Time to Draw the Line?*, 5 Election L.J. at 157 (suggesting, in the context of state legislative elections, that the AIRC's maps may actually have made districts less competitive because the Commission's mandate required it to prioritize other factors).

The AIRC also appears to have made progress on another measure of electoral fairness: Compared to its sister States, Arizona now enjoys a closer fit between the proportion of voters who support majority party candidates and the proportion of seats those candidates actually win. *See* Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & Pol. 331, 340 (2007). That means that the Commission's maps have not, overall, worked to the advantage of either party, and more accurately reflect the political views of the people as a whole.

These outcomes suggest that independent redistricting can ameliorate at least some of the negative effects of gerrymandering. And they comport with the findings of a recent study of election results from 1972 to 2012, employing a new way of measuring electoral efficiency, which concludes that independent commissions reduce discrepancies in "wasted" votes between the parties. *See* Nicholas Stephanop-

oulos, *Arizona and Anti-Reform*, U.Chi. Legal F. (forthcoming 2015) (manuscript at 14-15).[24] The study deems votes "wasted" if they are cast for a losing candidate or if they are excess votes for a winning candidate, over and above the number of the votes needed to win. It concludes that the discrepancy in wasted votes is low when an independent commission is responsible for redistricting, but high when districts are "cracked," "packed," or "tacked" by a state legislature. This is important: It means that independent commissions are having some success in disrupting the partisan playbook.

This is not to say that independent commissions are a panacea. The effect of the AIRC on congressional partisanship is hard to discern. *See* David G. Oedel, Allen K. Lynch, Sean E. Mulholland, Neil T. Edwards, *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 Vill. L. Rev. 57, 83 (2009) (concluding that "the average level of partisanship appears lower but statistically indistinguishable after redistricting" in Arizona). And there is a lively debate in the scholarly literature about the extent to which political independence of the kind the AIRC appears to enjoy is desirable or even possible. *See, e.g.*, Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 Wash. U.L. Rev. 667 (2006); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649 (2002); Samuel Issacharoff,

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[24] *Available at:* http://goo.gl/NLihV2 (last visited Jan. 22, 2015).

Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593 (2002).

But these debates do not diminish the important contribution institutions like the AIRC make, not only to the quality of representation available to Arizonans, but to the process of reform across the Nation. By learning from the example and experience of the independent commissions in Arizona, California, Hawaii, Idaho, New Jersey, and Washington, States will be able to develop new and better institutions to realize the Framers' vision of a House with "an immediate dependence on, and an intimate sympathy with, the people." The Federalist, No. 52.

CONCLUSION

Because the AIRC, and redistricting commissions like it, represent valuable efforts aimed at mitigating the corrosive effects of partisan gerrymandering, the judgment of the District of Arizona should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1314

In the Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current Members of Congress, from both major political parties, who share a strong interest in protecting and exercising Congress's authority under Article 1, Section 4 of the U.S. Constitution to "make or alter" regulations fixing the "Times, Places and Manner" of congressional elections. *Amici* have a direct and substantial interest in this case, because the Arizona Legislature, in challenging its own State's redistricting process, has raised broader questions about Congress's constitutional authority to regulate the manner of congressional elections nationwide, with potentially sweeping consequences.

Since 1842, Congress has exercised its authority under the Elections Clause to regulate the congressional districting process. In seeking to overturn the considered judgment of a majority of Arizona's voters, the Arizona Legislature in this case has advanced a cramped and ahistorical interpretation of the Elections Clause that would improperly constrain Congress's constitutional authority. *Amici* have an institutional interest in advising this Court about the proper interpretation of that Clause, Congress's long history of enactments under it, and the significance of those statutes for the questions presented. That history demonstrates that Congress has acted specifical-

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made any monetary contribution to its preparation and submission. All parties have consented to this filing.

ly to afford States the autonomy to determine congressional districts through an independent commission, just as Arizona has done here.

In the view of *amici*, the Arizona law at issue in this case is fully consistent with the Elections Clause, core principles of constitutional federalism, and 2 U.S.C. § 2a(c). *Amici* further believe that such commissions have the potential, when used in appropriate circumstances, to mitigate the potential negative effects of malapportioned congressional districts. As incumbent legislators, *amici* participate in this case based on broad bipartisan concern about the potential ill effects of partisan gerrymandering, not only for elections, but also for the functioning of our national government.

In recent years, Members of Congress from both political parties have proposed or supported legislation to address concerns about congressional redistricting. Those bills have varied significantly in focus and approach, and the signatories of this brief do not necessarily endorse all (or any) of them. However, these bills collectively show Congress's important and ongoing role in ensuring that state redistricting results in fair and competitive elections. See, *e.g.*, Fairness and Independence in Redistricting Act, S. 2910, 113th Cong. (2014); John Tanner Fairness and Independence in Redistricting Act, H.R. 223, 113th Cong. (2013); Let the People Draw the Lines Act of 2013, H.R. 2978, 113th Cong. (2013); Redistricting Transparency Act of 2011, H.R. 419, 112th Cong. (2011); Fairness and Independence in Redistricting Act of 2009, H.R. 3025, 111th Cong. (2009); Fairness and Independence in Redistricting Act of

2007, H.R. 543, 110th Cong. (2007). *Amici* have a strong interest in ensuring that this Court's resolution of this case does not improperly constrain Congress's authority under the Elections Clause to enact these or any future reforms.

Amici are the following Members of the U.S. House of Representatives, in alphabetical order:

Julia Brownley (D-Cal.)

Ken Calvert (R-Cal.)

Steve Cohen (D-Tenn.)

Jim Cooper (D-Tenn.)

Rodney Davis (R-Ill.)

Keith Ellison (D-Minn.)

Alan Grayson (D-Fla.)

Raul Grijalva (D-Ariz.)

Richard Hanna (R-N.Y.)

Duncan D. Hunter (R-Cal.)

Derek Kilmer (D-Wash.)

Zoe Lofgren (D-Cal.)

Alan Lowenthal (D-Cal.)

Tom McClintock (R-Cal.)

Mark Meadows (R-N.C.)

Beto O'Rourke (D-Tex.)

David E. Price (D-N.C.)

Tom Reed (R-N.Y.)

Reid Ribble (R-Wis.)

Dana Rohrabacher (R-Cal.)

SUMMARY OF ARGUMENT

As Appellees persuasively argue, the decision of a majority of Arizona's voters to establish an independent commission for congressional districting is consistent with both the U.S. Constitution and 2 U.S.C. § 2a(c). This brief makes four arguments to supplement Appellees' brief.

First, Congress has explicit and broad authority under Article I, Section 4 of the Constitution to regulate the times, places, and manner of state congressional elections. Although the federal government is necessarily one of limited powers, the Constitution's text, Founding-era history, and ratification debates all demonstrate that the Framers deliberately vested Congress with broad supervisory control over state establishment of congressional districts. Congress's power under the Elections Clause serves as an essential check on potential overreach by state legislatures, which may at times elevate the "convenience" of a controlling faction over the "common interest" of a representative national government. 5 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 401 (1836) ("Elliot's Debates") (James Madison). Concerns about partisan gerrymandering by state governments predate the Constitution itself, and help explain why the Framers gave Congress broad authority to supervise state regulation of the times, places, and manner of congressional elections. This Court has long recognized Congress's authority in this sphere to be "'paramount.'" *Ariz.* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253-2254

(2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

Second, Congress has for more than 170 years exercised its authority under the Elections Clause in a way that clearly supports the Arizona law challenged here. Starting in 1842, Congress enacted a series of statutes regulating both procedural and substantive aspects of state congressional redistricting. Those statutes—the direct predecessors of language found in the U.S. Code today—affirm the authority of the People of the several states to adopt redistricting procedures through direct democracy measures such as ballot initiatives. Most notably, in a 1911 statute that is the predecessor of 2 U.S.C. § 2a(c), Congress replaced earlier references to redistricting by a State "legislature," with a broader reference to States adjusting districts "in the manner provided by the laws thereof." The text and history of that statute, as explicitly construed by this Court, contradict the Arizona Legislature's contention that the States are absolutely barred from redistricting in a manner other than by their legislatures. Under the 1911 statute, retained today in 2 U.S.C. § 2a(c), States may redistrict in any manner consistent with their own lawmaking processes—including by ballot initiative.

Third, Arizona's use of an independent commission for congressional districting is consistent with core principles of federalism embodied in the Constitution and the Elections Clause itself, which seek to ensure a direct link between national representatives and the People. In replacing the Articles of Confederation with the Constitution, the Framers made fundamental structural choices intended to protect the relation-

ship between the national government and the People. The Elections Clause plays an important role in that structure, ensuring that national representatives are responsive to the People who elect them, not to the States in which they reside or particular factions of state government.

Fourth, use of an independent commission is an important, democracy-promoting development that can help reduce negative effects of severe partisan gerrymandering. Partisan manipulation of district boundaries tends to reduce competition in the districts where it occurs. When severe partisan gerrymandering creates effectively non-competitive districts, it undercuts citizens' ability to exercise a meaningful choice among candidates, diminishes robust political debate, and may lead voters to disengage from the electoral process. As Arizona voters recognized in amending their State's constitution to create the Commission, and as lawmakers and scholars have long observed, use of an independent commission can reduce these distorting influences and ensure that elections function as the Framers intended: as a meaningful choice between candidates for national office, where issues are fully and fairly debated from all sides.

ARGUMENT

As Appellees demonstrate, the Elections Clause of the U.S. Constitution does not prohibit Arizona's citizens from adopting an independent commission to establish their State's congressional districts. Arizona's law is also fully consistent with, and authorized by, 2 U.S.C. § 2a and its predecessor statutes, which since 1911 have contemplated states "redistrict[ing] in the

manner provided by the law thereof" rather than redistricting by the "legislature" alone, and since 1842 have reflected Congress's exercise of broad authority to regulate and modify state policy in this critical area.

I. The Constitution Confers Broad Authority On Congress To Regulate Elections To Ensure The Connection Between The People And The National Government

"Prior to the adoption of the Constitution, the States had joined together under the Articles of Confederation." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 803 (1995). Under that system, "'the States [had] retained most of their sovereignty, like independent nations bound together only by treaties.'" *Ibid.* (quoting *Wesberry* v. *Sanders*, 376 U.S. 1, 9 (1964)). At the Constitutional Convention, however, the Framers adopted a plan for a "new National Government," *Wesberry*, 376 U.S. at 10, that "reject[ed] the notion that the Nation was a collection of States, and instead creat[ed] a direct link between the National Government and the people of the United States." *Thornton*, 514 U.S. at 803; *FERC* v. *Mississippi*, 456 U.S. 742, 791 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part) ("The Constitution * * * permitt[ed] direct contact between the National Government and the individual citizen * * * "). The Elections Clause of the Constitution plays an essential role in that transformative reframing of the relationship between the People and their national government.

The Elections Clause states that "[t]he Times, Places, and Manner of holding Elections for Senators

and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4. The Clause "has two functions. Upon the States it imposes the duty ('*shall* be prescribed') to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253 (2013). This "broad" grant of power to Congress was critical to the Framers' adoption of the Elections Clause, functioning among other things as "insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress" and thus "'at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.'" *Ibid.* (quoting The Federalist No. 59, at 362-363 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis deleted)).

1. Constitutional Convention.

"[T]he Elections Clause was essentially uncontroversial at the 1787 Constitutional Convention in Philadelphia." Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021, 1031 (2005). Under the Articles of Confederation, "delegates" to the unicameral Congress were "annually appointed in such manner as the legislatures of each State shall direct." Articles of Confederation of 1781 art. V. para. 1. While the Articles established certain details about the time of meetings and term limits, the States retained prima-

ry authority over the selection of delegates, in recognition of their "sovereignty, freedom, and independence." *Id.* art. II.

"The Convention debates make clear" what is evident in the text of the Clause itself: "that the Framers' overriding concern was the potential for States' abuse of the power to set the 'Times, Places and Manner' of elections." *Thornton*, 514 U.S. at 808-809. Speaking in favor of Congress's supervisory role, Gouverneur Morris expressed fear that "the States might make false returns and then make no provisions for new elections." 2 *Records of the Federal Convention of 1787* at 241 (M. Farrand ed., 1911) ("Farrand").

After the Constitutional Convention achieved a quorum and adopted a series of resolutions to serve as the basis for the new Constitution, it appointed a "Committee of Detail" to prepare a draft constitution. The Committee's version of the Elections Clause was quite similar to the text ultimately adopted, contemplating an initial delegation of authority to the States, subject to congressional oversight.[2] There followed an unsuccessful effort to limit the Clause to the House of Representatives, an effort later vindicated in part by the addition of the words "except as to the Places of chusing Senators." See 2 Farrand at 613.

Madison argued, for his part, that congressional supervision was necessary because "State Legisla-

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[2] "The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered (or superseded) by the Legislature of the United States." 2 Farrand at 165.

tures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices." 2 Farrand at 240. In language no less relevant today, Madison feared that "inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter." *Id.* at 240-241. Congressional supervision was essential, Madison concluded, because "[i]t was impossible to foresee all the abuses that might be made [by the State legislature] of the discretionary power" to fix the "Times, Places and Manner of holding Elections." *Id.* at 240.

Thus, when Charles Pinckney and John Rutledge moved to delete language securing Congress's role from the Elections Clause, the motion was soundly defeated. 2 Farrand at 240-241. Several delegates opposed the Pinckney-Rutledge motion, including Gouverneur Morris (who objected that States, unconstrained by Congress, might engage in election fraud) and Massachusetts delegates Nathaniel Gorham and Rufus King (who argued that oversight power was essential to the survival of the national government). 5 Elliot's Debates at 401-402.

The motion to remove Congress's oversight role "seems largely to have been put to rest by Madison, who defended the wording of the Clause in a lengthy speech." Greene, 114 Yale L.J. at 1032. In Madison's words:

> The necessity of a general government supposes that the state legislatures will sometimes fail or re-

> fuse to consult the common interest at the expense of their local convenience or prejudices. * * * Whether the electors should vote by ballot, or *viva voce*, should assemble at this place or that place, should be divided into districts, or all meet at one place, should all vote for all the representatives, or all in a district vote for a number allotted to the district,—these, and many other points, would depend on the legislatures, and might materially affect the appointments. Whenever the state legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.

5 Elliot's Debates at 401. The Pinckney-Rutledge motion was subsequently defeated without any further recorded support. To the contrary, Delaware's George Read proposed language, ultimately adopted, expanding Congress's power by authorizing it both to alter and "*make*" election regulations. *Id.* at 402 (emphasis added). "As Hamilton later noted: 'Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.'" *Thornton*, 514 U.S. at 809 (quoting The Federalist No. 59, at 363).

2. Ratification debates.

"During the ratification debates" in the several states, Congress's authority under the Elections Clause engendered robust debate. See Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 23 (2010). Opponents highlighted the extent of au-

thority that the Clause would confer on Congress if adopted—as it ultimately was, without material amendment. See Vox Populi, Essay, Massachusettes Gazette, Oct. 29, 1878, in 4 *The Complete Anti-Federalist* § 4.4.2-6 (Herbert J. Storing ed., 1981) ("By this clause, the *time*, *place* and *manner* of choosing representatives is *wholly* at the disposal of Congress."). Those debates also ultimately confirm the understanding that the Elections Clause was predicated on a direct link between the People and their national representatives.

Federalist proponents of the Elections Clause raised a number of concerns about what state legislatures might do if left unchecked by Congress. They argued, for instance, that state legislatures might require electors to assemble in a remote location or at inconvenient times (to the disadvantage of those who could not travel), or might draw congressional districts in unfair ways. At the Massachusetts ratifying convention, for instance, Rufus King gave the example of "th[e] unequal mode of representation" reflected in South Carolina's legislative districts, which favored the city of Charleston to the disadvantage of rural areas. As a result, King feared, "[t]he representatives * * * from that state, will not be chosen *by the people*." 2 Elliot's Debates at 50-51. During the same debates, Francis Cabot "prize[d] the [Elections Clause] as highly as any in the Constitution," because of its role in protecting "the *democratic* branch of the national government, the branch chosen immediately for the people." *Id.* at 25-26. J.C. Jones of Massachusetts echoed the theme, explaining that "[t]he federal representatives will represent *the people*; they will be *the people*." *Id.* at 28-29.

Concerns about political manipulation of voting districts predated the Constitution, and featured in the Framers' drafting and ratification debates. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 274-275 (2004) (plurality opinion) (discussing "[p]olitical gerrymanders" in Colony of Pennsylvania and Province of North Carolina). The possibility of malapportionment of districts was explicitly discussed in debates, and delegates frequently expressed the expectation that the problem would be addressed by Congress. During the Massachusetts ratifying debates, for instance, Theophilus Parsons defended Congress's role as necessary to prevent States from "mak[ing] an unequal and partial division of the states into districts for the election of representatives." 2 Elliot's Debates at 27. Rufus King likewise emphasized the possibility that inequalities currently reflected in state legislative districts might be perpetuated in national representatives, such that "[t]he representatives * * * from that state, will not be chosen *by the people*, but will be the representatives of a faction of that state." *Id.* at 51.

Similarly, at the Virginia convention, James Madison viewed Congress's role under the Elections Clause as a safeguard against "the people of any state by any means be[ing] deprived of the right of suffrage," including by "unequa[l]" apportionment of legislative districts. 3 Elliot's Debates at 367; accord 4 Elliot's Debates at 303 (remarks by Charles Pinckney) (Congress's role under Elections Clause was necessary "lest, by the intrigues of a ruling faction in a state, the members of the House of Representatives should not really *represent the people* of the state" (emphasis added)). In short, Congress's power under the Elections Clause was understood as "a remedy for

all manner of state regulations thought by the national government to be unjust or inappropriate." Greene, 114 Yale L.J. at 1038 (conducting detailed study of ratification debates).

Similar themes were reflected in responses to Anti-Federalist criticism that "Federal rulers" could "have interests separate from those of the people." Timothy Pickering, for instance, explained that representatives in Congress would not abuse their power under the Clause, because they were "the immediate Representatives of the people." 2 Charles W. Upham, *The Life of Timothy Pickering* 356 (1873) (letter to Charles Tillinghast of December 24, 1787) (emphasis omitted). In short, the Constitution's text, together with evidence from the Convention and ratification debates, show that the Elections Clause was intended to protect the direct connection between the People and their representatives to the national government, against the possibility of self-interested interference by the state legislature.

II. Congress Has Long Exercised Its Broad Constitutional Authority To Regulate State Redistricting Policies In A Manner That Supports Arizona's Redistricting Law

The Arizona Legislature contends that Congress has not allowed States the autonomy to adopt an independent commission for redistricting by means of a ballot initiative, and that it would be "plainly unconstitutional" for Congress to do so, in any event. Br. for Appellant 56. Thus framed, the Legislature's challenge is not limited to the facts of this case, but rather, if accepted, would call into question Congress's general constitutional authority to regulate

the times, places, and manner of congressional elections—with potential consequences for Congress's ability to supervise a wide range of existing and future state laws in this sphere. The Arizona Legislature's position must be rejected.

As the text and history of the Constitution make clear, and this Court has long recognized, the Elections Clause vests Congress with essentially plenary authority to regulate the States' conduct of congressional elections. The Clause states, without material qualification, that Congress "may at any time * * * make or alter" regulations "prescribed [by] each State" and governing the times, places, and manner of congressional elections. U.S. Const. art. I, § 4. "Through the Elections Clause, the Constitution delegated to the States the power to regulate the 'Times, Places and Manner of holding Elections for Senators and Representatives,' subject to a grant of authority to Congress to 'make or alter such Regulations.'" *Cook* v. *Gralike*, 531 U.S. 510, 522 (2001) (quoting U.S. Const. art. I, § 4, cl. 1); accord *Smiley* v. *Holm*, 285 U.S. 355, 366-367 (1932) ("[T]he Congress may supplement these state regulations or may substitute its own"); *Wesberry*, 376 U.S. at 29-30 (Harlan, J., dissenting) (the Elections Clause states "without qualification, that Congress may make or alter such [State] regulations. There is nothing to indicate any limitation whatsoever on this grant of plenary initial and supervisory power.").[3]

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[3] Because "federal offices" such as seats in the House of Representatives "'aris[e] from the Constitution itself,'" "any state authority to regulate election to those offices could not precede their very creation by the Constitution, [and] such power 'had to

James Madison explained that authority must be vested in Congress because "[s]ome states might regulate the elections on the principles of equality, and others might regulate them otherwise. * * * Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." 3 Elliot's Debates at 367.

As a plurality of this Court has concluded, "the Framers provided a remedy for * * * practices [such as malapportionment of districts] in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished." *Vieth*, 541 U.S. at 275 (plurality opinion). Congress's power "over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, * * * the regulations effected supersede those of the State which are inconsistent therewith.'" *Inter Tribal Council*, 133 S. Ct. at 2253-2254 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

A. Congress's Longstanding Exercise Of Its Elections Clause Authority Supports Arizona's Redistricting Law

The Arizona Legislature contends that 2 U.S.C. § 2a "has nothing to do" with the validity of Arizona's commission law, and that it would be "plainly unconstitutional" if Congress sought to authorize the States

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be delegated to, rather than reserved by, the States.'" *Cook*, 531 U.S. at 522 (quoting *Thornton*, 514 U.S. at 804, 805).

to conduct redistricting through that method, in any event. Br. for Appellant 54-55. That argument, however, rests on an incomplete and ultimately mistaken understanding of the Constitution's text and history, this Court's precedent, and the long series of congressional enactments regulating the time, place, and manner of congressional elections.

Congress first enacted districting legislation in 1842, as part of a statute that required States electing representatives on a statewide, "at-large" basis, to instead create single-member districts. See Act of June 25, 1842, § 2, 5 Stat. 491. The 1842 act also required that representatives in a multi-district State "shall be elected by districts composed of contiguous territory * * *, no one district electing more than one Representative." *Ibid.* Although an 1850 statute adjusting the size of the House of Representatives omitted provisions requiring elections by districts, see Act of May 23, 1850, § 25, 9 Stat. 428, 432-433, Congress soon re-enacted the requirements for one-member districts composed of contiguous territory, Act of July 14, 1862, 12 Stat. 572.

The apportionment act of 1872 exercised still broader authority over congressional districting, specifying the date "for the election of Representatives * * * to * * * Congress," and that vacancies would be filled (or failure to elect a Representative remedied) "at such time as is or may be provided by law for filling vacancies in the State or Territory in which the same may occur." Act of Feb. 2, 1872, §§ 3, 4, 17 Stat. 28, 29. The 1872 act also directed that districts contain "as nearly as practicable an equal number of inhabitants," and that, if a State was "given an in-

creased number of Representatives," its new Members "be elected by the State at large * * * unless the legislature of said State shall otherwise provide before the time fixed by law for the election." *Id.* § 2, 17 Stat. at 28.

The apportionment acts of 1882 (Act of Feb. 25, 1882, § 3, 22 Stat. 5, 6) and 1891 (Act of Feb. 7, 1891, §§ 3-4, 26 Stat. 735, 736) repeated the contiguity and equal-population requirements. And the 1891 Act again allowed at-large election "in case of an increase in the number of Representatives which may be given to any State," but only until "the legislature of such State in the manner herein prescribed shall redistrict such State." 1891 Act, § 4, 26 Stat. at 736. Apportionment legislation of 1901, in turn, directed that districts be "composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants," with "no one district electing more than one Representative." Act of Jan. 16, 1901, § 3, 31 Stat. 733, 734. Like earlier statutes, the 1901 act provided that any additional representatives accruing to a State be elected "at large," until "the legislature of such State in the manner herein prescribed, shall redistrict such State." *Id.* § 4, 31 Stat. at 734.

Ten years later, however, in response to the emergence of the initiative "[i]n the early twentieth century" as a more common means of exercising the state lawmaking power (Br. for Appellees 4-5),[4] Congress

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[4] By the end of 1910, some twelve States or Territories had adopted initiative and referendum mechanisms; only two (South Dakota and Utah) had done so prior to the 1901 apportionment act. See Nathaniel A. Persily, *The Peculiar Geography of Direct*

clarified prior statutes by adopting language that has been carried forward to today, and is critical to the questions before this Court. While retaining the major substantive requirements from earlier statutes, Congress in 1911 amended language discussing *how* States would adjust districts. In place of prior references to action by "the legislature of such State," the 1911 statute contemplated the State being "redistricted in the manner *provided by the laws thereof*." Act of Aug. 8, 1911, §§ 3-4, 37 Stat. 13, 14 (emphasis added); see also *id.* § 5, 37 Stat. at 14 (candidates for at-large seats "shall be nominated in the same manner as candidates for governor, unless otherwise provided *by the laws of such State*" (emphasis added)).

As the Commission explains (see Br. for Appellees 28-30), this Court has repeatedly interpreted the 1911 amendment as deliberate congressional action acknowledging and affirming States' authority to choose methods of districting other than by the legislature itself. This Court recognized in *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 568 (1916):

> Congress in 1911 in enacting the controlling law * * * expressly modified the phraseology of the previous acts * * * by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the

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Democracy: Why the Initiative, Referendum and Recall Developed in the American West, 2 Mich. L. & Pol'y Rev. 11, 16 (1997); see also *State I & R*, Initiative & Referendum Institute, Univ. of S. Cal., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Jan. 21, 2015).

> state legislative power for the purpose of creating congressional districts by law.

The *Hildebrant* Court contrasted the 1891 statute discussed above, with the new 1911 language contemplating redistricting by a State "'in the manner provided by the laws thereof.'" *Ibid.* (quoting 37 Stat. at 14).

As this Court further observed in *Hildebrant*, "the legislative history of th[e] [1911] act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose * * * of excluding the possibility of making the contention" that redistricting was limited to the legislature itself. *Hildebrant* thus rejects the argument the Arizona Legislature now advances—that direct democracy methods "could not be a part" of a State's redistricting process. *Hildebrant*, 241 U.S. at 568-569, 567 (citing 47 Cong. Rec. 3436, 3437, 3507 (1911)).

The Commission's brief persuasively shows why the 1911 legislative record supports this Court's holding in *Hildebrant*. See Br. for Appellees 29-30. That record shows that Members understood amending the statute to refer to districting "by the law of such State" would ensure to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. at 3437 (Sen. Burton). The 1911 statute, Members expected, would "simply [leave] the question [of redistricting] to the laws and methods of the States. If they include initiative, it is included." *Id.* at 3508.

Senator Burton of Ohio, a main proponent of the 1911 amendment, questioned why, "in the face of different methods and laws pertaining to the enactment

of legislation – some States acting by the legislature, others acting by the legislature but subject to a referendum," Congress should desire to "fix one inflexible way and require that every State shall be divided into congressional districts in that manner." 47 Cong. Rec. at 3507. "[W]hether we favor the referendum and initiative or not," Burton emphasized, "we cannot close our eyes to the fact that there has been a widespread agitation for their adoption and further that [the] agitation has not stopped with mere advocacy." *Id.* at 3507-3508. "[W]e cannot," Senator Burton explained, "cling either to obsolete phraseology or, in our dealing with the States, to adhere to obsolete methods – that is, to ignore their methods of enacting laws." *Ibid.*

Tellingly, some Members questioned whether the amendment was needed at all, suggesting that existing apportionment statutes (referring to redistricting by "the legislature") were *already* "sufficient to allow, whatever the law of the State may be, the people of the State to control the matter." 47 Cong. Rec. at 3507 (Sen. Shively). Proponents insisted, however, that "[i]n view of the very serious evils arising from gerrymanders," Congress should "not take any chances in [the] matter," *id.* at 3508 (Sen. Burton). The possibility existed that some might construe the existing statutes as a "condemnation of any legislation [for districting] by referendum or by initiative." *Id.* at 3436 (Sen. Burton). "[D]ue respect to the rights, to the established methods, and to the laws of the respective States requires us," Senator Burton argued, "to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Ibid.*

In Senator Burton's view, "[i]f there is any case in the whole list of laws where you should apply your referendum, it is to a districting bill. * * * [The amendment would] give[] to each State full authority to employ in the creation of congressional districts its own laws and regulations. What objection can be made to a provision of that kind? Pass this amendment, and you will transmit to each State the message 'Proceed and district your State in accordance with your laws.'" 47 Cong. Rec. at 3437 (Sen. Burton). Other Members of Congress understood the change the same way. See *id.* at 3508 (Sen. Works). The amendment passed.[5]

In a striking coincidence, Congress was debating the 1911 apportionment act at the same time it was considering whether to admit Arizona to the Union. See 47 Cong. Rec. at 3510 (Sen. Root) (discussing admission of Arizona on the same day as Burton amendment). Notably, the Arizona Territory employed the initiative process even before it sought admission, and Congress explicitly debated the merits of that system in considering Arizona's application. See Br. for Appellees 49-50 n.27 (citing 47 Cong. Rec. 4229 (1911) (Mr. Davenport)). That Congress enacted legislation allowing States to redistrict "in the manner provided by the laws thereof," 37 Stat. at

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[5] Even those opposed the 1911 legislation (on other grounds) recognized that potential malapportionment of congressional districts required "some way * * * to secure fairness in the division of the State into congressional districts." A solution "worthy of serious consideration by the Senate," the minority Members suggested, was "a general clause submitting apportionment acts to a referendum vote of the electorate of the State." S. Rep. No. 62-94, pt. 2, at 4-5 (1911) (minority views).

14, while simultaneously debating whether to admit a State whose lawmaking process was well understood to include initiatives, creates a strong inference that the Arizona law in this case falls comfortably within the 1911 Congress's expectation of how States would conduct redistricting.

1929 reapportionment legislation did not displace or repeal the 1911 act in any material part. See Act of June 18, 1929, § 22, 46 Stat. 21, 27. The 1911 statute was effectively "carried into the United States Code." *Smiley*, 285 U.S. at 373, and a 1941 statute used the current wording ("shall be elected from the districts then prescribed by the law of such State"). The 1911 act is the direct predecessor to 2 U.S.C. § 2a(c), as codified today. See *Branch* v. *Smith*, 538 U.S. 254, 274 (2003) (opinion of Scalia, J.); accord *id.* at 295 (O'Connor, J., concurring in part and dissenting in part) ("the 1911 statute * * * is almost word for word the same as the current [2 U.S.C. § 2a(c)]").

B. Congress Can Constitutionally Authorize State Popular Reform Of Redistricting

As the Commission explains (Br. for Appellees 27-33), the Arizona Legislature is incorrect to argue that "nothing" in 2 U.S.C. § 2a(c) bears on the questions presented, and that it would be "plainly unconstitutional" for Congress to attempt to authorize States to adopt an independent redistricting commission via ballot initiative. Br. for Appellant 56.

By its plain terms, 2 U.S.C. § 2a(c) contemplates that "the Representatives to which [a] State is entitled * * * shall be elected from the districts then prescribed by the law of such State." The statute refers repeatedly to districting undertaken "by the law of

[the] State," following a national apportionment, whether a State retains the same number of representatives, or the size of its delegation increases or decreases.

This Court is not writing on a blank slate in construing § 2a(c) or considering its constitutionality. In upholding the use of a referendum in Ohio (coincidentally, Senator Burton's home state) to approve or disapprove districts adopted by that State's General Assembly, *Hildebrant* relied extensively on the 1911 predecessor to § 2a(c), which it understood to "treat[] the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws." 241 U.S. at 569. The 1911 act was itself constitutional as applied in this manner, this Court concluded, as it reflected Congress's exercise of what "the Constitution expressly gave [it] the right to do." *Ibid.*

So too in *Smiley*, 285 U.S. 355, which upheld a Minnesota law requiring presentment of all legislation (including redistricting bills) to the Governor for signature or veto, and a two-thirds majority of both houses to overcome a veto. *Smiley* viewed the Elections Clause's reference to the "times, places and manner of holding elections" as "comprehensive," conferring on Congress "authority to provide a complete code for congressional elections." *Id.* at 366. *Smiley* squarely upheld the constitutionality of a state requiring presentation of redistricting legislation to the governor, instead of entrusting it entirely to the "Legislature thereof." And in reaffirming *Hildebrant*, the *Smiley* Court reiterated that Congress's purpose in referring to "the laws thereof" in the 1911 apportion-

ment statute was "manifest from its occasion and purpose"—i.e., "to recognize the propriety of the referendum in establishing congressional districts where the state had made it a part of the legislative process." *Id.* at 371.

More recently, *Branch* v. *Smith* concluded that the phrase "established by law" was not limited to action by the legislature of a State. 538 U.S. at 271 (opinion of the Court). Although the facts of *Branch* raised the issue of whether state *courts* had authority to engage in redistricting, nothing in the Court's opinion was limited to courts. *Ibid.* (looking to "common meaning" of phrase "by law," and finding it not limited to State legislature); accord *id.* at 300 & n.1 (O'Connor, J., concurring in part and dissenting in part) ("To the extent that courts are part of the 'manner provided by the law [of a State],' courts may redistrict."). The Arizona Constitution expressly "reserve[s]" to "*the people*" the "legislative authority" and "power to * * * enact * * * laws and amendments at the polls." Ariz. Const. art. 4, pt. 1, § 1 (emphasis added).[6]

As demonstrated in section II.A *supra*, Congress has since at least 1842 exercised its authority under

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[6] Appellant cites (at 57), without explanation, two cases invalidating other federal statutes on completely different constitutional grounds. They are irrelevant here. *Clinton* v. *City of New York*, 524 U.S. 417, 421 (1998), simply held that the "cancellation procedures" in the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), violated the Presentment Clause of the Constitution. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), held that the Religious Freedom Restoration Act of 1993 exceeded Congress's power under the Fourteenth Amendment. No opinion in either case mentioned the Elections Clause.

the Elections Clause to regulate states' conduct of congressional redistricting. Since 1911, Congress has done so in a manner that explicitly contemplates election of congressional representatives from districts "prescribed by the law of [each] State." 2 U.S.C. § 2a(c). This longstanding historical practice is a strong indication that Congress acted within the scope of its constitutional authority, and at a minimum provides the perspective of numerous early Congresses on the meaning of the Elections Clause. Cf. *Smiley*, 285 U.S. at 369 ("[L]ong and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning.").

Members of Congress have long understood the Elections Clause to encompass States' use of an independent commission for districting. Senator Burton, the main proponent of the 1911 amendment contemplating state redistricting "by the laws thereof," opened the floor debate on that bill by discussing his own prior bill proposing a "new plan for dividing States into districts." That plan was not unlike the Arizona law here: i.e., "the governor of each State should appoint a nonpartisan board of four, two members from each party, which should proceed to divide the State into districts according to certain well-defined rules * * * " 47 Cong. Rec. 3507 (1911) (Sen. Burton).

The Legislature's principal contention (*e.g.*, Br. for Appellant 36) is that Arizona's use of the commission violates the Elections Clause because it "completely divests the Legislature's authority to prescribe congressional districts." But Congress plainly has au-

thority to displace state regulations, by "mak[ing]" its own congressional districts for a State, creating a federal commission to do so, or even requiring States to employ such a method. Records from the Constitutional Convention and ratification debates show that adoption of the Clause rested in significant part on concerns (e.g., disproportionate allocation of state legislative districts) that are redressed by state reliance on direct-democracy methods such as the referendum and ballot initiative in the redistricting process. Appellant does not explain why, if Congress has authority to directly impose such a requirement, it would be "plainly unconstitutional" (Br. 55) for Congress, ex ante, to allow States to choose such an approach.

The Legislature focuses heavily on *Branch*'s discussion of whether other portions of 2 U.S.C. § 2a(c) are rendered unconstitutional by this Court's subsequent decisions on grounds not relevant here. As the Commission explains, however, the Legislature's reliance on *Branch* is misplaced. That case dealt with different questions not presented here—*e.g.*, whether § 2a(c)(5)'s requirement of elections "at large" pending redistricting was superseded by 2 U.S.C. § 2c's requirement of one-member districts.[7] And while *Branch* had no occasion to restate *Hildebrant*'s core holding (i.e., that the 1911 statute contemplates States using direct democracy methods in redistricting), *Branch* said nothing at all to displace or under-

[7] A majority of Justices in *Branch* concluded that § 2a(c) had *not* been implicitly repealed by § 2c. See *Branch*, 538 U.S. at 273 (plurality opinion); accord *id.* at 282 (Kennedy, J., concurring); *id.* at 292-293 (O'Connor and Thomas, JJ., concurring in part and dissenting in part); cf. Br. for Appellant 54 (suggesting only that "plurality" of court had rejected repeal by implication).

cut *Hildebrant*'s result or rationale, which strongly support the Arizona law at issue here.

III. Popular Reform Of State Districting Processes Is Fully Consistent With Core Federalism Principles

In the Arizona Legislature's view, the Elections Clause "[v]ests State [a]uthority * * * in the State's [r]epresentative [l]awmaking [b]ody [a]lone" because of "the Framers' admiration for representative democracy and skepticism for other forms of government, including direct democracy." Br. for Appellant 24, 31. On that basis, the Legislature invites this Court to hold that Arizona's citizens transgressed the Elections Clause when they created the Commission via a ballot initiative.

These arguments, however, rest on an incomplete and ultimately mistaken account of the Constitution's text, structure, and ratification history. Full consideration confirms that popular regulation of congressional elections to guard against potential manipulation of congressional district boundaries by incumbent state legislators is fully consistent with the Constitution's core purpose of ensuring a direct link between the People and their representatives to the national government.

Although the Framers certainly endorsed notions of representative democracy in the structure of the federal government (see Br. for Appellant 31-36), treatment of the Elections Clause in the Constitutional Convention and ratification debates makes clear that the Framers vested Congress with plenary control over the times, places, and manner of elections, in significant part to safeguard the relationship

between the People and their representatives to the national government. See *supra* Section I.

Consistent with this textual and historical evidence, this Court's cases have long recognized "the 'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" *Thornton*, 514 U.S. at 783 (quoting *Powell* v. *McCormack*, 395 U.S. 486, 547 (1969)). To that end, this Court has understood the Framers as having deliberately "creat[ed] a direct link between the National Government and the people of the United States." *Id.* at 803; *id.* at 822 (emphasizing "the direct link that the Framers found so critical between the National Government and the people of the United States"). In short, "[n]othing in the Constitution or The Federalist Papers * * * supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." *Id.* at 842.

"From the start," this Court has emphasized,

> the Framers recognized that the "great and radical vice" of the Articles of Confederation was "the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15, at 108 (Hamilton). Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the

> people, and chosen directly, not by States, but by the people.

Thornton, 514 U.S. at 821.

This Court has noted with approval Madison's argument against mechanisms that "'would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone.'" *Thornton*, 514 U.S. at 808 (quoting The Federalist No. 52, at 326). The Elections Clause thus reflects "[t]he principle * * * that Senators and Representatives in the National Government are responsible to the people who elect them, not to the States in which they reside." *Gralike*, 531 U.S. at 528 (Kennedy, J., concurring). "[F]reedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office." *Ibid.* This Court has not hesitated to strike down measures that threatened to "blur[]" the "direct line of accountability between the National Legislature and the people who elect it." *Ibid.*

IV. The Independent Redistricting Commission Is A Positive And Democracy-Promoting State Innovation

As this Court has long recognized, "[a]s long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Ensuring that Congress is "directly representative of the people," *ibid.*, despite ongoing national and state-level

population shifts, requires not only decennial reapportionment of congressional seats *among* States, but also adjustment of congressional districts within States.

As scholars have long recognized, however, partisan manipulation of district boundaries can reduce competition in the districts where it occurs. See Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 Am. Pol. Sci. Rev. 540, 540 (1973) (concluding that "recent reapportionments in the United States have had dramatic and unexpected effects on the translation of votes into [legislative] seats"); Michael Lyons & Peter F. Galderisi, *Incumbency, Reapportionment and U.S. House Redistricting*, 48 Pol. Res. Q. 857, 857 (1995) (concluding that incumbents may "benefit from party controlled redistricting").

When partisan gerrymandering creates effectively uncompetitive districts, it undercuts voters' ability to exercise a meaningful choice among candidates, diminishes robust political debate, and may lead to disengagement from the electoral process. The Center for Voting and Democracy, for instance, reports that in the 2010 election cycle, some 64 percent of House seats involved a margin of victory of at least 20 percent. In some districts with particularly strong incumbents or majority parties, there may be no opposing candidate at all; as many as 27 House seats were reported as uncontested in the 2010 elections.[8] Dis-

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[8] See U.S. Profile, *Dubious Democracy 1982-2010*, Ctr. for Voting & Democracy, http://www.fairvote.org/research-and-analysis/congressional-elections/dubious-democracy/dubious-

tricts without healthy competition between two or more candidates may limit voters' ability to make meaningful choices between candidates or issues.

As Arizona voters recognized in amending their constitution, an independent redistricting commission can reduce these distorting influences and ensure that elections function as the Framers intended: a meaningful choice between candidates for national office, where issues are fully and fairly debated from all sides. Scholars have suggested, for instance, that vesting districting responsibility in an independent and "technocratic" commission can defuse or minimize concerns that the process is partisan or subject to political interference. See Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 Election L.J. 184, 194 (2007). Such a commission may also bring important expertise and experience to bear on a process that increasingly involves complex and conflicting considerations, including population shifts, district compactness, racial and ethnic considerations, partisan composition, county and municipal boundaries, and preservation of communities of shared interest. See James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 Rutgers L.J. 881, 894-897 (2006).

The decision by an increasing number of States to employ independent commissions for congressional districting may promise a more fair and transparent electoral process, and may increase competition and

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democracy-1982-2010/u-s-profile-2010/ (last visited Jan. 21, 2015).

accountability in congressional elections.[9] A wide range of observers and interest groups have endorsed the advantages of such an approach. *E.g.*, Am. Bar Ass'n House of Delegates, Report No. 102A (Feb. 11, 2008) (urging all States "to assign the redistricting process for congressional and legislative districts to an independent commission").

To resolve this case, of course, the Court need not grapple with these disputed and often difficult questions about the optimal method for States to establish and adjust congressional districts. Indeed, given the diverse histories and circumstances of the several States, and the possibility of "considerable disagreement * * * about how best to accomplish th[e] goal" of fair and competitive congressional elections, this case illustrates the Framers' genius in allowing "States [to] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States* v. *Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citing *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 49-50 (1973)). It is sufficient to conclude, as the text and history of the Elections Clause and 2 U.S.C. § 2a(c) clearly require, that there is no basis for this Court to disturb the choice made by Arizona's citizens to establish congressional districts in that State through an independent commission.

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[9] In addition to Arizona, six other States currently place primary authority for drawing congressional districts in a nonpartisan or independent group. See Cal. Const. art. XXI, §§ 1-3; Haw. Const. art. IV; Idaho Const. art. III, § 2; Mont. Const. art. V, § 14(2) (because Montana has only one congressional seat, this mechanism is not currently in use); N.J. Const. art. 2, § 2; Wash. Const. art. II, § 43.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-1314

IN THE

Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,
Appellees.

On Writ of Certiorari to the United States District Court for the District of Arizona

BRIEF OF *AMICUS CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Conference of State Legislatures ("NCSL"), is a bipartisan organization that represents the legislatures of all of the states and territories in the United States. One of NCSL's core missions is to improve the quality and effectiveness of those bodies. NCSL regularly files *amicus curiae* briefs in cases that, like this one, raise issues of vital concern to state legislatures.[2]

State legislatures, as independent branches of co-equal states in our system of Federalism, are deeply involved in the redistricting process. The creation of congressional districts has traditionally been left to state legislatures under the Elections Clause of the United States Constitution. Consequently, state legislatures consider the redistricting process a core legislative function expressly delegated to them by our Founding Fathers.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* NCSL affirms that the position it takes in this brief has not been approved or financed by Petitioner, Respondents, or their counsel. Neither Petitioner, Respondents, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. Pursuant to Supreme Court Rule 37.3, *amicus curiae* NCSL states that all parties have consented to the filing of this brief; evidence of written consent of all parties has been filed with the clerk.

[2] For example, NCSL submitted *amicus curiae* briefs in *Wood v. Moss*, 572 U.S. ___, 134 S. Ct. 2056 (2014), *Maryland v. King*, 569 U.S. ___, 133 S. Ct. 1958 (2013), and *Filarsky v. Delia*, 566 U.S. __, 132 S. Ct. 1657 (2012).

NCSL has a keen interest in protecting the powers granted to state legislatures by our Constitution. The current case raises questions regarding whether a redistricting process that completely removes the state legislature from congressional redistricting is constitutional. NCSL asserts that it is not, and therefore files this brief in support of Petitioner.

SUMMARY OF THE ARGUMENT

The Elections Clause of the Constitution provides that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof . . . ."[3] Consistent with this clause, this Court long has recognized that districting is "primarily a matter for legislative consideration and determination."[4]

States have implemented this delegation of power in different ways. In thirty-seven states, the legislature draws the congressional redistricting plan. The other thirteen states involve both the legislature and some form of redistricting commission. All but two of these thirteen states respect the Election Clause's delegation by maintaining a substantive role for the legislature. But Arizona and one other state provide the legislature no substantive involvement in redistricting. In fact, Proposition 106, which created Arizona's federal redistricting commission, expressly

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[3] U.S. Const. art. I, § 4, cl. 1.

[4] *White v. Weiser*, 412 U.S. 783, 794 (1973).

serves to "remov[e] redistricting authority from the Arizona Legislature."[5]

Excluding the legislature from substantive involvement in redistricting contravenes the Elections Clause and this Court's consistent "adher[ence] to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment."[6] Consequently, the decision of the court below contravenes this Court's decisions and the intent of the Elections Clause. NCSL therefore respectfully supports Petitioner's challenge to the lower court's decision.

ARGUMENT

I. VIRTUALLY ALL STATES OTHER THAN ARIZONA GIVE THEIR LEGISLATURES A SUBSTANTIVE ROLE IN THE PROCESS OF REDISTRICTING

The Elections Clause states that, unless Congress provides otherwise, "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof . . . ."[7] The Clause gives state

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[5] Betsey Bayless, Ariz. Sec'y of State, *2000 Ballot Propositions & Judicial Performance Review: Proposition 106*, 60 (Sept. 2000), *available at* http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf.

[6] *White*, 412 U.S. at 795 (quoting *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964)).

[7] U.S. Const. art. I, § 4, cl. 1.

legislatures the power to regulate the mechanics of congressional elections.[8]

Consistent with the language of the Elections Clause, the state legislature draws new congressional districts in thirty-seven states. The other thirteen states involve commissions in the congressional redistricting process. These commissions generally fall into four categories. Three of the four categories are consistent with the Elections Clause because they retain a substantive role for the state legislature. In those states, the legislature retains the power either to draw the congressional districting plan itself or to exercise its unfettered discretion to select the majority of the commissioners who will draw the plan. These three categories of commissions are:

(1) advisory commissions, which, as the name implies, advise the legislature on redistricting criteria and proposed plans but cannot themselves enact a plan;

(2) backup commissions, which can enact a plan, but only if the legislature fails to do so in the first instance; and

(3) politician-appointed commissions, most of whose members are either members of the legislature or appointed by members of the legislature, and most of which certify the final redistricting plan without a vote of the legislature.

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[8] *See Cook v. Gralike*, 531 U.S. 510, 522-23 (2001).

Arizona uses a fourth type of commission. Under Arizona's system, the legislature cannot draw the congressional redistricting plan. The legislative leaders pick the majority of the members of the commission, but the legislative leaders can pick these commissioners only from a list in which the legislature has no input. This fourth type of commission thus excludes the legislature from all substantive aspects of congressional redistricting.

A. The Vast Majority of States That Employ Commissions in Districting Also Substantively Involve the Legislature

1. Advisory Commissions

Advisory Commissions are commissions whose only role is to provide advisory reports, suggestions, or proposed redistricting maps to a state legislature. The state legislature retains its ability to adopt or reject congressional redistricting plans. Four states have advisory commissions: Iowa, New York, Ohio, and Maine.[9]

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[9] Rhode Island had an advisory commission for its 2011-2012 congressional redistricting plan, but the wording of the law strongly suggests that the commission will not be used for future elections. *See* S. 924, 2011 Gen. Assemb., Reg. Sess. (R.I. 2011), *available at* http://webserver.rilin.state.ri.us/PublicLaws/law11/law11100.htm; H. 6096, 2011 Gen. Assemb., Reg. Sess. (R.I. 2011), *available at* http://webserver.rilin.state.ri.us/PublicLaws/law11/law11106.htm; *see also* Press Release, State of Rhode Island General Assembly, New Law Creates Redistricting Commission (June 18, 2014), *available at* http://www.rilin.state.ri.us/pressrelease/_layouts/RIL.PressRele

In Iowa, while the state legislature retains power to approve or reject congressional redistricting plans, the Legislative Services Agency ("LSA"), a nonpartisan support office,[10] undertakes the collection of specified data and information, and provides the legislature with draft congressional redistricting plans.[11] The LSA is assisted by a five-member temporary redistricting advisory commission,[12] which holds public hearings regarding redistricting bills and reports on the hearings.[13]

Once the LSA drafts a congressional redistricting plan, the state legislature may enact it or refuse to enact it, but cannot modify it.[14] If the state legislature refuses to enact the plan, the LSA will submit a second congressional redistricting bill.[15] In the event the state legislature does not approve the second bill, the LSA will submit a third

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ase.ListStructure/Forms/DisplayForm.aspx?List=c8baae31-3c10-431c-8dcd-9dbbe21ce3e9&ID=7017 (announcing that the commission will be used for the 2011 redistricting cycle).

Virginia also had an advisory commission for the 2011-2012 redistricting process. *See About the Commission*, Independent Bipartisan Advisory Commission on Redistricting, http://cnu.edu/redistrictingcommission/about.asp (last visited Dec. 3, 2014). This commission was created by executive order. *See Executive Order No. 31*, Independent Bipartisan Advisory Commission on Redistricting, http://cnu.edu/redistrictingcommission/eo-31.asp (last visited Dec. 3, 2014).

[10] See *Legislative Services Agency (LSA)*, The Iowa Legislature, https://www.legis.iowa.gov/agencies/nonpartisan/lsa (last visited Dec. 3, 2014).

[11] Iowa Code Ann. § 42.2 (West 2014).

[12] *Id.* § 42.5.

[13] *Id.* § 42.6.

[14] *Id.* § 42.3.

[15] *Id.*

congressional redistricting bill.[16] If the state legislature fails to approve the third LSA bill, the state legislature may amend the congressional redistricting plan.[17]

New York recently has adopted an advisory commission for use in the next congressional redistricting cycle.[18] The commission will include ten members, eight of whom will be appointed by the four leaders of the state legislature.[19] Those eight will then appoint the final two members of the commission.[20] As in Iowa, the commission will present a congressional redistricting plan to the state legislature, which may be approved only without amendment.[21] If the first plan is not passed, the commission can then present a second plan to the state legislature.[22] If the legislature does not approve the second bill without amendment, the

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[16] *Id.*

[17] *Id.*

[18] *New York*, All About Redistricting, Loyola Law School, http://redistricting.lls.edu/states-NY.php (last visited Dec. 3, 2014); Jessica Bakeman, *Voters Approve All Three Ballot Propositions*, Capital (Nov. 5, 2014), http://www.capitalnewyork.com/article/albany/2014/11/8556069/voters-approve-all-three-ballot-propositions.

[19] *Proposal One*, State of New York, State Board of Elections, 1, http://www.elections.ny.gov/NYSBOE/Elections/2014/Proposals/ProposalOneFinal.pdf (last visited Dec. 3, 2014).

[20] *Id.*

[21] *Id.* at 2-3.

[22] *Id.*

state legislature may introduce any amendments it deems necessary.[23]

Ohio has a six-member advisory commission.[24] The commission is a legislative task force created to support the congressional redistricting work of the legislature.[25] The president of the senate and the speaker of the house of representatives each appoint three members.[26] No more than two of the three appointees may be members of the same political party as the appointer.[27] And at least one of the three appointees must not be a member of the general assembly.[28]

Like New York, Maine has a single advisory commission. The commission is comprised of fifteen members.[29] The speaker of the house of representatives and the leader of the largest minority party each appoint three members.[30] Similarly, the majority leader of the senate and the leader of the largest minority party in the senate each appoint two members.[31] The remaining five members are "the chairperson of each of the [two] major political parties in the State or their designated representatives; and [three] members from the public generally, one to be selected by each

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[23] *Id.*
[24] Ohio Rev. Code Ann. § 103.51(A) (West 2014).
[25] *Id.* § 103.51(C)(1).
[26] *Id.* § 103.51(A).
[27] *Id.*
[28] *Id.*
[29] Me. Const. art. IV, pt. 3, § 1-A.
[30] *Id.*
[31] *Id.*

group of members of the commission representing the same political party, and the third to be selected by the other [two] public members."[32] The commission drafts the congressional redistricting plan and submits it to the state legislature, which may then enact the commission's plan or a plan of its own by a two-thirds vote.[33]

2. Backup Commissions

As stated above, backup commissions are those that can redistrict only after a state legislature has failed to complete congressional redistricting on its own. Two states currently have backup commissions: Connecticut and Indiana.

In Connecticut, the Reapportionment Committee has responsibility for congressional redistricting should the state legislature not enact a plan by a specified statutory deadline.[34] The Reapportionment Committee has nine members, eight of whom are designated (two each) by the four top legislative leaders.[35] The four legislature leaders are not limited to predetermined list from which to select members, but have wide discretion in their selections. The eight appointees select a ninth member, who must also be an elector of the state.[36]

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[32] *Id.*

[33] Me. Rev. Stat. tit. 21-A, § 1206 (West 2014); *see also* Me. Const. art. IV, pt. 1, § 3; Me. Const. art. IV, pt. 2, § 2.

[34] Conn. Const. art. III, § 6(b).

[35] *Id.* § 6(a).

[36] *Id.* § 6(b).

Once the Reapportionment Committee has a plan that is certified by at least five members of the commission, the plan is sent to the secretary of state, who publishes the plan.[37] Upon publication, the plan becomes law.[38]

Indiana has a five-member backup commission.[39] The five members are the speaker of the state house of representatives, the president pro tem of the state senate, the chairperson of the state senate and house committees responsible for legislative apportionment, and a fifth member appointed by the governor from the general assembly.[40] A plan adopted by the majority of the backup commission is then sent to the governor, who issues an executive order adopting the plan.[41]

3. Politician-Appointed Commissions

Politician-appointed commissions can create congressional redistricting plans without approval by the state legislature. But in every case, the legislature has a substantive role in redistricting because it appoints a majority of the members of the commission (not from a predetermined list). Five states have politician-appointed commissions for congressional redistricting: Hawaii, Idaho, Montana, New Jersey, and Washington.

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[37] *Id.* § 6(c).

[38] *Id.*

[39] Ind. Code Ann. § 3-3-2-2 (West 2014).

[40] *Id.*

[41] *Id.*

Hawaii's commission has existed since 1968. The commission includes nine members.[42] The senate president and speaker of the house each select two members. "Members of each house belonging to the party or parties different from that of the president or the speaker" select a member from each house, and these two designees each select two additional members for the commission.[43] The eight members, with a vote of six, select the ninth member, who serves as chairperson of the commission.[44] The commission prepares a congressional redistricting plan, conducts public hearings on each island about the plan, and modifies it as necessary after the hearings.[45] The commission then files a final congressional redistricting plan, which, after public notice and a time period set by statute, becomes effective.[46]

Idaho's approach is similar to Hawaii's. The Idaho commission consists of six members.[47] The minority and majority leaders of the two largest parties in each of the two houses of the state legislature select one member apiece.[48] The chairpersons of the two largest political parties also select one member apiece.[49] The commission prepares a final congressional redistricting plan,

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[42] Haw. Const. art. IV, § 2.
[43] *Id.*
[44] *Id.*
[45] Haw. Rev. Stat. § 25-2(b) (West 2014).
[46] *Id.*
[47] Idaho Const. art. III, § 2(2).
[48] *Id.*
[49] *Id.*

which must be approved by two-thirds of the commission.[50]

Montana also vests congressional redistricting authority in a politician-appointed commission. Montana's commission consists of five members. Four are appointed (one each) by the majority and minority leaders of each of the two legislative houses.[51] The fifth member is selected by the other four members.[52] The commission has ninety days after release of the final decennial census figures to file a final congressional redistricting plan with the secretary of state, after which the plan becomes law.[53]

New Jersey's commission has thirteen members.[54] Twelve of the thirteen are selected by politicians and political parties.[55] Two are appointed by the president of the senate, two by the speaker of the general assembly, two by the minority leader of the senate, and two by the minority leader of the general assembly.[56] Four members are appointed, two each, by the chairperson of the state party whose candidate received the largest number of votes in the most recent gubernatorial election and the state party whose candidate received the next largest number of votes.[57] The thirteenth member is an

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[50] *Id.* § 2(4).
[51] Mont. Const. art. V, § 14(2).
[52] *Id.*
[53] *Id.* § 14(3).
[54] N.J. Const. art. II, § 2, ¶ 1(a).
[55] *Id.* ¶ 1(b)(1)-(4).
[56] *Id.*
[57] *Id.* ¶ 1(b)(5).

independent member who is elected by seven of the other twelve members.[58]

The New Jersey commission chooses a new congressional redistricting plan by majority vote in a public meeting.[59] If the commission does not do so by the statutory deadline, the New Jersey Supreme Court selects and certifies whichever of the two plans that received the most votes most conforms to the requirements of United States law.[60] The selected plan must have received at least five votes.[61]

Washington's commission consists of five members.[62] Four are chosen by the legislative leaders of the "two largest political parties" in each house of the state legislature.[63] These four members select the fifth member, who serves as the non-voting chairperson of the commission.[64] The commission's final plan must be approved by at least three of the commission's members.[65] The legislature may amend the plan with a two-thirds vote of each house.[66] "Any amendment must have passed both houses by the end of the thirtieth day if the first session convened after the commission has submitted its plan to the legislature."[67]

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[58] *Id.* ¶ 1(c).
[59] *Id.* ¶ 3.
[60] *Id.*
[61] *Id.*
[62] Wash. Const. art. II, § 43(2).
[63] *Id.*
[64] *Id.*
[65] *Id.* § 43(6).
[66] *Id.* § 43(7).
[67] *Id.*

B. Only Arizona and One Other State Completely Divest Their Legislatures of Their Authority to Redistrict

In contrast to the three types of commissions described above, two states have independent commissions that wholly deprive the state legislature of any meaningful role in the redistricting process: California and Arizona.

The California Redistricting Commission ("CRC") was originally created to focus on legislative redistricting.[68] In 2010, the CRC's charge was expanded to include congressional redistricting after the passage of California Proposition 20.[69] The CRC has fourteen members, a number arrived at from an original pool of sixty candidates: twenty from each of the two largest political parties and twenty who belong to neither party.[70] After the sixty are

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[68] Letter from Kathay Feng, Jeannine English, and David Fleming to Patricia Galvan, Initiative Coordinator, Attorney General's Office (Oct. 22, 2007) *available at* http://ag.ca.gov/cms_pdfs/initiatives/i746_07-0077_Initiative.pdf.

[69] *Proposition 20*, Text of Proposed Laws, *available at* http://www.wedrawthelines.ca.gov/downloads/voters_first_act_for_congress.pdf (last visited Dec. 3, 2014).

[70] *See* Cal. Const. art. XXI, § 2(c)(2); Cal. Gov't Code § 8252 (West 2014). "Each commission member shall be a voter who has been continuously registered in California with the same political party or unaffiliated with a political party and who has not changed political party affiliation for five or more years immediately preceding the date of his or her appointment. Each commission member shall have voted in two of the last three statewide general elections immediately preceding his or her application." Cal. Const. art. XXI, § 2(c)(3).

selected, the singular and minimal input from the state legislature occurs. The majority and minority leader from each house may eliminate up to two candidates from each of the three groups, for a total of eight eliminations from each of the three groups.[71]

After the legislature's role is completed, eight members (three from each major party and two registered with neither party) are selected randomly from the remaining candidates.[72] These eight commissioners then select six additional commissioners (two from each group), each of whom must have received a simple majority vote from the existing eight commissioners.[73] The final plan is approved by a minimum of nine votes of the commission, which must be comprised of at least three commissioners registered with the largest political party, three registered with the second largest political party, and three registered with neither party, and must then be approved by a public referendum.[74]

Unlike the California commission, which originally participated only in legislative redistricting, from the start Arizona's Independent Redistricting Commission (the "AIRC") has been charged with redistricting both Arizona's congressional and legislative districts. The AIRC originated in 2000, when Arizona's voters approved Proposition 106, which amended the state

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[71] Cal. Gov't Code § 8252(e) (West 2014).

[72] *Id.* § 8252(f).

[73] *Id.* § 8252(g).

[74] Cal. Const. art. XXI, § 2(c)(5).

constitution by "remov[ing] congressional redistricting authority from the Legislature and vest[ing] that authority in [the AIRC]."[75]

The AIRC has five independent members.[76] The commissioners are selected from an original pool of twenty-five candidates.[77] The twenty-five candidates must include ten from each of the two largest political parties in the state and five who are not registered with either party.[78] The candidates

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[75] *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1048 (D. Ariz. 2014); *see also* David K. Pauole, Comment, *Race, Politics & (In)equality: Proposition 106 Alters the Face and Rules of Redistricting in Arizona*, 33 Ariz. St. L.J. 1219, 1222 (2001) ("The obvious consequence of Proposition 106 is the displacement of the legislature by an independent redistricting commission in the redrawing of congressional and legislative districts.").

[76] Ariz. Const. art. IV, pt. 2, § 1(3) ("No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent, and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.").

[77] *Id.* § 1(5).

[78] *Id.*

are selected not by the state legislature or any of its members; instead, they are selected by the Arizona state commission on appellate court appointments,[79] which does not include any legislators among its members.[80]

Each of the four legislative leaders then chooses one commissioner from the pre-selected list of 25 candidates.[81] The four commissioners chosen by the legislative leaders then select the fifth commissioner, who may not be registered in the same party as any of the four commissioners.[82]

There is a critical difference between the Arizona redistricting commission and the politician-appointed commissions described above. In the case of the politician-appointed commissions, the designated legislators can choose whomever they want as commissioners. In Arizona, however, the legislative leaders must pick from a pre-selected list of candidates, which effectively prevents the legislature from picking the commissioners of its choice.[83]

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[79] *Id.*

[80] *Id.* art. VI, § 36.

[81] *Id.* art. IV, pt. 2, § 1(6).

[82] *Id.* § 1(8).

[83] California and Arizona only permit the legislature, or members of the legislature, to select commission members from preselected lists of candidates. Other congressional redistricting commissions may limit or provide guidelines for the potential pool from which candidates may be selected, but do not limit the legislature to a preselected list. Such limitations and guidelines may include: excluding past or current elected officials for a period of time; taking into account

II. THE CONSTITUTION REQUIRES THAT STATE LEGISLATURES BE INVOLVED SUBSTANTIVELY IN THE REDISTRICTING PROCESS

A. This Court Long Has Recognized That Redistricting Is Primarily the Province of State Legislatures

"From the beginning, [this Court] ha[s] recognized that 'reapportionment is primarily a matter for legislative consideration and determination.'"[84] This Court thus consistently has "adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment."[85]

This longstanding recognition has arisen at least in part from the reality that political judgment is necessary to balance the competing interests posed by redistricting,[86] and that this "inevitably political decision[] must be made by those charged with the task," i.e., elected representatives.[87] For these reasons, this Court "ha[s] never denied that

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geographical, ethnic, and racial considerations in commissioners; or including only voters registered for a certain period of time.

[84] *White*, 412 U.S. at 794 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *see also Ely v. Klahr*, 403 U.S. 108, 114 (1971) ("[A]s we have often noted, districting and apportionment are legislative tasks in the first instance . . . .").

[85] *White*, 412 U.S. at 795 (quoting *Md. Comm. for Fair Representation*, 377 U.S. at 676).

[86] *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

[87] *White*, 412 U.S. at 796-97.

apportionment is a political process . . . ."[88] To the contrary, the Court has expressly recognized that "[p]olitics and political considerations are inseparable from districting and apportionment."[89] In fact, the involvement of politics in redistricting is so inherent that this Court has declined to strike down politically motivated redistricting plans, even in cases where the evidence of partisanship was overwhelming: "Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State was *conscious* of that fact."[90]

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[88] *Karcher v. Daggett*, 462 U.S. 725, 739 (1983); *see also id.* at 740 (recognizing that "avoiding contests between incumbent Representatives" is a permissible state redistricting policy).

[89] *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *see also Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion) ("The Constitution clearly contemplates districting by political entities, *see* Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.").

[90] *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (citing *Bush v. Vera*, 517 U.S. 952, 968 (1996)); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996); *Miller*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. 630, 646 (1993); *see also Vieth*, 541 U.S. 267 (upholding a Pennsylvania congressional redistricting plan that was challenged as a pro-Republican gerrymander); *Davis v. Bandemer*, 478 U.S. 109 (1986) (upholding an Indiana legislature plan alleged to be a partisan gerrymander); *Gaffney*, 412 U.S. at 752 (upholding a Connecticut legislature plan alleged to be a bipartisan gerrymander).

That redistricting is inherently political does not, however, make redistricting a non-justiciable political question. *See Baker v. Carr*, 369 U.S. 186 (1962).

The principle that redistricting is primarily the province of state legislatures is so fundamental that courts defer to legislative determinations regarding districting whenever possible. Thus, if a court determines that a districting plan violates a constitution or statute and that there is sufficient time for the legislature to correct the violation in advance of an election, the court will remand to the legislature to correct the plan.[91]

Even if there is insufficient time for the legislature to cure the violation before the next election, (1) the court will amend the legislature's plan only as far as necessary to correct the violation and (2) the court's plan will be in place only until the legislature enacts a proper plan.[92] It therefore is

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[91] *See, e.g.*, *Md. Comm. for Fair Representation*, 377 U.S. at 675 (finding it inappropriate to discuss remedial questions because with the next election a year away, "sufficient time exist[ed] for the Maryland Legislature to enact legislation reapportioning seats"); *Davis v. Mann*, 377 U.S. 678, 692-93 (1964) ("We find it unnecessary and inappropriate to discuss questions relating to remedies at the present time. Since the next election of Virginia legislators will not occur until 1965, ample time remains for the Virginia Legislature to enact a constitutionally valid reapportionment scheme for purposes of that election.").

[92] *See Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971) (finding that the lower court had erred because the court-ordered redistricting plan modified the legislature's plan more than was necessary to correct the constitutional violations); *Reynolds*, 377 U.S. at 586 (finding that a district court faced with an unconstitutional plan should act "so as not to usurp the primary responsibility for reapportionment which rests with the legislature" and affirming that court's decision to issue only temporary relief).

well established that the legislature has primary responsibility for federal redistricting.

B. That This Court Has Approved Involvement by the People and the Executive Branch Does Not Belie the Need for Substantive Legislative Involvement

The court below found that this Court's decisions in *Ohio ex rel. Davis v. Hildebrant*[93] and *Smiley v. Holm*[94] demonstrate that state legislatures need not be included in the redistricting process. The court below was mistaken. *Smiley* and *Hildebrant* establish only that the public or state executive officials may weigh in on redistricting. In neither of those cases did the Court suggest, much less hold, that the legislature may be substantively excluded from the redistricting process. Accordingly, these cases are not contrary to the longstanding recognition that districting is inherently political and that the legislature has primary jurisdiction over districting. *See supra* Section II.A.

In *Hildebrant*, this Court held that the people of Ohio could constitutionally disapprove the legislature's redistricting plan by referendum where Ohio law granted the people the right to "approve or disapprove by popular vote any law enacted by the general assembly."[95] This decision did not divest the legislature of its primary role in redistricting.

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[93] 241 U.S. 565 (1916).

[94] 285 U.S. 355 (1932).

[95] 241 U.S. at 566.

Rather, it approved Ohio's ability under its delegated powers to give the people a voice in redistricting.

Similarly, in *Smiley*, this Court found that the governor of Minnesota could use his state-granted veto power to veto the legislature's passage of a redistricting act. The Court did not grant the governor complete control over districting; it merely recognized that the powers delegated to the states through the Elections Clause permit a state to include the executive branch in redistricting.

Neither of these rulings is at odds with the longstanding recognition that districting is inherently political and that the legislature holds primary jurisdiction over districting. In fact, most states' redistricting commissions demonstrate that there are many ways to redistrict that do not exclude the legislature's substantive involvement. *See supra* Section I.A.

But Proposition 106, which created the AIRC completely – and intentionally – divests the state legislature of substantive involvement in redistricting[96] and "vest[s] the primary redistricting responsibility" in the AIRC.[97] This fact distinguishes

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[96] *See* Bayless, *supra* note 5 ("A 'yes' vote shall have the effect of creating a [five]-member 'Citizens' Independent Redistricting Commission' with no more than [two] members from each political party and no more than [three] members from each county, to draw legislative and congressional district boundaries and removing redistricting authority from the Arizona Legislature.").

[97] *Cf. Ariz. State Legislature*, 997 F. Supp. 2d at 1055-56.

the present case from *Hildebrant* and *Smiley*, where the state legislature "still retained *some role* in the choice of congressional districting."[98] Indeed, as the dissent in the court below pointed out, these cases "involved situations in which the state legislature participated in the redistricting decision-making process in some very significant and meaningful capacity. . . . [Neither] held that the Elections Clause can be so broadly interpreted as to permit a state to remove all substantive redistricting authority from its legislature."[99] Thus, *Hildebrant* and *Smiley* are entirely consistent with the argument NCSL makes here – that Article I, Section 4 requires either that the state legislature pass the congressional redistricting plan or that it have unfettered discretion to choose whomever it wants to be the majority of the members of the redistricting commission.

In short, the AIRC is at odds with both the Elections Clause and the longstanding recognition that redistricting is inherently political and primarily the province of the legislature. Proposition 106 and the resulting redistricting commission in Arizona therefore should be struck down.

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[98] Richard L. Hansen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 Hastings Const. L.Q. 599, 618 (2008).

[99] *Ariz. State Legislature*, 997 F. Supp. 2d at 1057.

III. CONCLUSION

For the reasons set forth above, NCSL respectfully requests that this Court reverse the decision of the United States District Court for the District of Arizona.

December 9, 2014

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AMICUS CURIAE BRIEF

No. 13-1314

IN THE
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF NATHANIEL PERSILY, BRUCE E. CAIN, AND BERNARD GROFMAN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici are political scientists who are experts on redistricting, direct democracy, and the regulation of the electoral process. *Amici* have served as nonpartisan experts or special masters for courts and redistricting commissions to assist in the development of state or federal redistricting plans.[2] Moreover, *amici*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have filed with the Court a blanket consent authorizing such a brief.

[2] Nathaniel Persily is the James B. McClatchy Professor of Law at Stanford Law School with appointments in both Communication and Political Science, and recently served as the nonpartisan expert for the Presidential Commission on Election Administration; his CV is available at http://www.persily.com/. He served as a special master or court-appointed expert in the following cases: *Favors v. Cuomo*, 2012 WL 928223 (Mar. 19, E.D.N.Y. 2012); *In Re Petition of Reapportionment Commission, Ex. Rel.*, 36 A.3d 661 (Conn. 2012); *Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004); *In the Matter of Legislative Redistricting of the State*, 805 A.2d 292 (Md. 2002); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. 2002). Bernard Grofman is Professor of Political Science and Director of the Center for the Study of Democracy at the University of California, Irvine, and holds the Jack W. Peltason Bren Foundation Endowed Chair; his CV is available at http://www.socsci.uci.edu/~bgrofman/. He served as a court-appointed expert in *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. May 24, 2002); *Flateau v. Anderson*,

have been among the foremost critics, on policy grounds, of both independent redistricting commissions and direct democracy.[3]

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537 F. Supp. 257 (S.D.N.Y. 1982). Bruce E. Cain is the Director of the Bill Lane Center for the American West and the Charles Louis Ducommun Professor in Humanities and Sciences, and Professor of Political Science at Stanford University; his biography is available at http://west.stanford.edu/node/965. He served as a Special Master in *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002), and as an expert witness on behalf of the Arizona Independent Redistricting Commission in recent litigation concerning its state legislative redistricting.

[3] *See, e.g.*, Bruce E. Cain, *Democracy More or Less: America's Political Reform Quandary* (2014); Peter Miller & Bernard Grofman, Redistricting Commissions in the Western United States, 3 UC Irvine L. Rev. 637 (2013); Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808 (2012) (hereinafter Cain, *Redistricting Commissions*) ; Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. Cal. L. Rev. 1997 (2005); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent Protecting Gerrymanders*, 116 Harv. L. Rev. 649 (2002) (hereinafter Persily, *Foxes Guarding Henhouses*); Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev 11 (1997); Joshua Fougere, Stephen Ansolabehere, & Nathaniel Persily, *Partisanship, Public Opinion, and Redistricting*, 9 Election L.J. 325 (2010); Bruce E. Cain, et al., *Redistricting and Electoral Competitiveness in State Legislative Districts*, (Midwest Political Sci. Ass'n, Apr. 13, 2007) *available at* http://citation.all

Amici submit this brief to bring to the Court's attention relevant social science research concerning redistricting commissions and direct democracy, not to endorse a particular institutional design for the redistricting process. Based on their experience and research, *amici* are in agreement on three key points. First, state-based experimentation in both the rules and institutions governing the congressional redistricting process is absolutely critical to address widespread and well-recognized pathologies of that process. Second, the regulation of elections, including federal elections, through direct democracy can provide a critical avenue for political reform in the face of recalcitrant, polarized, and often conflicted state legislatures. Finally, *amici* fear that aggressive judicial intervention on Elections Clause grounds would throw into constitutional doubt a range of important election practices that have been passed and will be passed again by way of direct democracy.

SUMMARY OF THE ARGUMENT

Having searched in vain to arrive at a constitutional standard for partisan gerrymandering, this Court has left to the states the matter of restraining partisan excess in the redistricting process. Consequently, states have experimented with various institutions and rules to govern congressional redistricting. Because incumbents and dominant parties often have a conflict of interest when it comes to altering the process of redistricting that helped get them elected in the first place, the tools of direct democra-

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academic.com/meta/ p196951_index.html (hereinafter Cain et al., *Redistricting and Electoral Competitiveness*).

cy have proven particularly useful for redistricting reform. An interpretation of the Elections Clause that would pull the plug on such experiments would prevent states from attempting to meet the challenge the Court has placed before them: namely, to develop rules and institutions for redistricting that are sensitive to local political contexts and reflect a variety of state-specific decisions about the appropriate considerations for the redistricting process.

That Appellant's argument would call into question a number of state redistricting laws and institutions is cause enough for concern, but the asserted constitutional principle would jeopardize a much wider array of election laws, some with a pedigree stretching back to the Progressive Era. If initiatives establishing redistricting commissions like Arizona's are unconstitutional because they wrest control over elections from the state legislature, it is difficult to see how the many other popularly enacted statutes and constitutional amendments regulating "the Times, Places, and Manner of holding Elections" are constitutional. Recent initiatives dealing with voter identification, primary reforms, election technology, and the like, would fail constitutional scrutiny with such an interpretation. So too might such an interpretation call into question age-old reforms, such as the direct primary, which were often instituted by popular initiative because legislatures controlled by party machines resisted popular participation in nomination processes.

The importance of direct democracy for electoral reform is not limited to the election statutes and constitutional provisions passed at the ballot box. The mere availability and threat of the initiative alters the bargaining that occurs within legislatures over

election legislation. The character of election-related legislation passed by state legislatures in initiative states, therefore, is often affected by the specter of initiatives should the legislature not act. The full impact of direct democracy in the states that allow it can be seen throughout their electoral codes.

The Court should reject Appellant's invitation to open up a potentially bountiful new area of election law litigation. The bounds of Appellant's argument cannot be easily contained, and could stretch even beyond redistricting and initiative-based election law to all manner of involvement in election law by courts acting under state constitutions, governors and local governments. Whether by rejecting Appellant's argument on the merits or by avoiding this constitutional question altogether through the many avenues available in this case, the Court should not strike down the Arizona Independent Redistricting Commission under the Elections Clause.

ARGUMENT

I. STATE EXPERIMENTATION IN THE RULES AND INSTITUTIONS GOVERNING CONGRESSIONAL REDISTRICTING IS CRITICAL TO ADDRESS WELL-KNOWN PATHOLOGIES OF GERRYMANDERING.

A. States have adopted a variety of methods to distance the redistricting process from control by parties, incumbents, and candidates.

This Court has had difficulty arriving at an administrable constitutional standard to govern partisan

gerrymandering claims. Nevertheless, despite the many opinions in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), all agreed that in the redistricting process, "excessive injection of politics" is unlawful. *Id.*, at 293 (Scalia, J.) (plurality opinion) ("So it is and so does our opinion assume."). This understandable desire of the Court not to wade into this particular "political thicket" represents an invitation to the states to find their own standards and institutions to avoid what the Court has deemed unlawful. *Id.* at 292 ("The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.")

States have taken up that invitation by establishing a multiplicity of institutions to deal with the redistricting process. Most still allow state legislatures to draw congressional districts through normal legislation. Many others, however, have attempted to achieve some measure of distance between elected legislators and the process for drawing their own constituencies and those of the congressional districts they often aspire to represent. *See generally* Cain, *Redistricting Commissions*.

Designing a redistricting process insulated from political pressure is no easy task. In most cases, those who draw the lines are either politicians themselves or individuals appointed (directly or indirectly) by elected politicians or party leaders. *See id.*; Persily, *Foxes Guarding Henhouses*. Nothing in the commission form of redistricting, necessarily, ensures independence: A legislative majority could simply appoint the majority of a commission or otherwise direct it to adopt a specific redistricting plan. That

said, some process other than the typical majority vote of legislators plus gubernatorial signature is necessary, even if not sufficient, to provide some measure of independence.

Recognizing the conflict of interest of state legislators and the poisonous polarization that redistricting inflicts upon the legislature as an institution, many states have identified redistricting as an area where the normal process of legislation should be altered. Seven states — Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington — vest initial redistricting authority in independent commissions. *See* Ariz. Const. art. IV, pt. 2, § 1; Cal. Const. art. XXI, § 2; Haw. Const. art. IV, §§ 2, 9; Idaho Const. art. III, § 2; Mont. Const. art. V, § 14(2); N.J. Const. art. II, § 2; Wash. Const. art. II, § 43. These commissions are generally structured to give equal weight to minority and majority political parties in the state. None require any approval by state legislatures for final district maps to become law.

Because redistricting commissions differ from each other in a number of respects, one must be careful in celebrating the commission form of redistricting as uniquely beneficial according to one or another variable. For example, many hope that commissions will make elections more competitive and facilitate the election of moderate legislators. The literature is mixed, at best, in its support of those arguments, in part because political segregation often prevents the creation of districts that are evenly balanced according to party. *See generally Solutions to Political Polarization in America* (Nathaniel Persily ed., 2015). However, because certain commissions, such as California's, are in their infancy, we may have better da-

ta by the end of the decade to assess these claims, assuming such commissions continue to exist.

Still, political scientists have arrived at some revealing conclusions as to the potential benefits of redistricting commissions. First, bipartisan and nonpartisan commissions are less likely than legislatures under unified party control to produce plans with extreme partisan biases. *See* Cain et al., *Redistricting and Electoral Competitiveness* (comparing raw partisan bias averages for commission and non-commission states); Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 Cal. J. Pol. & Pol'y 1, 22-24 (2012) (finding sharp drop in bias after California adopted commission); Simon Jackman, *Measuring Electoral Bias: Australia, 1949-93*, 24 Brit. J. Pol. Sci. 319, 344-45 (1994) (finding sharp drops in bias after South Australia and Queensland adopted commissions); Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 UC Irvine L. Rev. 669, 710-11 (2013) (finding that commissions reduce efficiency gap in state legislative elections); Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, U. Chi. Legal F. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2551556 (finding the same for congressional eelctions. This should come as no surprise; to the extent that commissions, on average, do not seek to manipulate the line-drawing process for partisan advantage (or do so less than a unified legislature drawing lines on its own), we should expect commission plans to be somewhat less biased.

Second, commission plans are more likely to be passed on time, in accordance with statutory dead-

lines. *See* Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 UC Irvine L. Rev. 637 (2013). This may sound like a small advantage, but getting redistricting done by a statutorily prescribed deadline allows potential candidates to identify their districts, begin ballot qualification, and commence their campaigns a sufficient time before an actual election. Commissions' relatively strict compliance with statutory deadlines is representative of their approach to legal requirements, in general. Because commissions are under less pressure to push the limits of the law to gain partisan advantage, their plans are less likely to violate constitutional and statutory provisions governing the redistricting process. *See* Cain, *Redistricting Commissions*, at 1812; Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical / Bipartisan Legislative Redistricting Commissions*, 13 Kan. J.L. & Pub. Pol'y 115, 132 (2004); *Action on Redistricting Plans: 1991-99*, Redistricting Task Force for the Nat'l Conference of State Legislatures, http://www.senate.leg.state.mn.us/departments/scr/redist/Redsum/Action1990.htm; *Action on Redistricting Plans: 2001-07*, Redistricting and Elections Comm. for the Nat'l Conference of State Legislatures, http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/action2000.htm.

Finally, while it may be difficult to prove empirically, redistricting commissions, by their nature, relieve legislatures of the polarizing task of drawing district lines. Commissions may not produce plans that produce less polarized delegations, but they do avoid burdening the legislature with the kinds of redistricting decisions that can cause lasting enmity among

elected representatives and between parties. The process of line drawing can be the most contentious enterprise in which legislatures engage. *See, e.g.*, Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541 (1994) ("In total, legislative redistricting is one of the most conflictual forms of regular politics in the United States short of violence."); *Id.* ("Indeed, because the costs of the political fight frequently outweigh the benefits of government service during redistricting, incumbents disproportionately choose to retire during this time."); *see also* Steve Bickerstaff, *Lines in the Sand: Congressional Redistricting in Texas and the Downfall of Tom Delay* (2010) (describing the effects of recent redistricting on the Texas legislature). When legislators use the line-drawing process to protect some incumbents but not others or to maximize partisan advantage, the bad feeling engendered by this once-a-decade process can last well into the future by poisoning relations among legislators. Not only are independent commissions somewhat insulated from the partisan pressures of legislatures, but, in turn, they also insulate legislatures from the inevitable partisan rancor caused by decennial redistricting.

B. A contorted interpretation of the Elections Clause would call into question many, if not all, redistricting commissions currently tasked with drawing congressional lines.

The interpretation of the Elections Clause urged by Appellant in this case would threaten most, if not all,

of the commissions charged with drawing congressional lines. Appellant stated its far-reaching argument succinctly in their reply brief at the petition stage: "Any state effort to oust the legislature from the congressional-redistricting process raises serious questions under the Elections Clause whether it is accomplished via referendum, other means of constitutional amendment, executive fiat, or even bicameralism and presentment."[4] In short, the problem with Arizona's commission, as Appellant sees it, is that the elected legislature does not have control over the redistricting process.

The critical constitutional test for a state's redistricting system, if one is to believe Appellant's argument, must be whether the legislature could pass a redistricting plan that will supersede the plan of the commission. That is, if two institutions draft two different plans, does the legislature's plan take precedence under state law? Following Appellant's reasoning, only then is the "Legislature," rather than the commission, "prescrib[ing]" the "Places and Manner of holding elections." The redistricting commissions in Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington would all fail this test. In those states, which comprise roughly 20 percent of congressional seats (88 in total), the legislature does not control the redistricting process to the extent required by Appellant's interpretation of the Elections Clause.[5]

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[4] Reply Br. of Appellant for Motion to Dismiss or Affirm at 9 (July 14, 2014).

[5] To be precise, those states together contain 89 congressional districts. Because Montana currently has only

Indeed, it is not at all clear why the so-called back-up commissions in Indiana and Connecticut, *see* NCSL Br. at 9, would even pass this test. The fact that commissions in those states act only if the legislature fails to draw its own plan does not mean that those commission plans are "prescribed in each State by the Legislature" if one is to believe Appellant's argument. Under the proposed definition, only the elected Legislature — not commissions, executives, courts or other institutions — can act in any way to diminish legislative control of the redistricting process.

The fact that legislative leaders pick most or all of the commissioners (as they do in every commission state except California) does not make their commissions agents of their legislatures, as Appellant would consider them. Legislators in Arizona, after all, pick all but one of the commissioners there, albeit from a restricted pool determined by the Arizona state commission on appellate court appointments. Ariz. Const. art. IV, pt. 2, § 1(5). Aside from the restricted pool, Arizona looks like the other commission states, in that the majority and minority leaders of the two state houses choose most or all of the commissioners. See NCSL Br. at 10-14. In Arizona, the fifth commissioner is then chosen by the four selected by the legislative leaders. In other states, such as Idaho and New Jersey, party leaders outside of the legislature also play a role by selecting some of the commissioners. *See* Idaho Const. art. III, § 2(2); N.J. Const. art. II, § 2, ¶ 1(b)(5).

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one district, its commission did not draw districts this cycle, but it has in the past and may again in the future.

Although each commission has its differences in member selection, redistricting criteria, and voting rules, their defining feature is that they do not, in fact, recreate the elected legislature in a smaller form. The participation of both parties in the selection of an equal number of commissioners ensures partisan balance even under conditions of one-party legislative dominance, which currently exist in all commission states, except Washington.[6] If non-commission states are any guide, the plans that emerge from these commissions are almost certainly different than those that would emerge from one-party states in which minority party interests can be ignored altogether and the "Legislature" as an institution acts without restraint. *See* Stephanopolous, *Arizona and Anti-Reform*, at 13-17. Regardless, if one takes Appellant at its word, nominees of legislative leaders are not "the Legislature" in a constitutional sense. Indeed, the whole purpose of these institutions is to create some distance between the commissioners and the elected legislature as it traditionally operates.

One might argue that legislatures, nevertheless, voluntarily delegate their redistricting power to commissions they create, and that therefore legislatures act through these commissions. For California and Arizona, of course, the commissions were created by popular initiative, and Hawaii's commission is a creature of its state constitution, which was passed by a convention, not the legislature. Commissions in

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[6] *See Statevote 2014: Election Results*, Nat'l Conference of State Legislatures (Nov. 19, 2014), *available at* http://www.ncsl.org/research/elections-and-campaigns/statevote-2014-post-election-analysis635508614.aspx.

New Jersey, Idaho, and Washington were originally created by legislatively-referred constitutional amendments approved by the people in referenda. In each of those states, the legislature may have consented to the commission decades ago when it placed an amendment on state ballots, but is now barred from changing the law. In other words, when the commissions craft plans in those states, "the Legislature" does not, in Appellant's sense, "prescribe" "the Manner" of congressional elections.

Indeed, Appellant's "Lone Ranger" conception of the "Legislature" calls into question not only commissions, but other redistricting constraints provided through popular initiatives, constitutional provisions, or statutes. Florida's popularly enacted constitutional amendment, for example, provides that "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." Fla. Const. art. III, § 20. Appellant hopes to distinguish such constraints as "'general guidance to the legislature,'" as opposed to complete "eviscerat[ion]" of the legislature's redistricting authority through a commission. Appellant's br. at 41 (quoting *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1280 (11th Cir. 2012)). But the key question remains whether this popularly enacted provision of state law would operate in the event the legislature, acting under its Elections Clause authority, ignores the provision and enacts its own redistricting plan. Under such circumstances, Appellant's strained interpretation necessarily would instruct a court to uphold the legislature's plan. To do otherwise would suggest that another institution, either the people through the initiative or a state court that

would craft a remedial plan, has the power to "prescribe" a redistricting plan.

II. THE TOOLS OF DIRECT DEMOCRACY HAVE PROVEN PARTICULARLY EFFECTIVE AS A MEANS OF ENACTING ELECTION-RELATED REFORMS.

The Elections Clause is not limited, of course, to laws and institutions concerning redistricting. In fact, although this Court has assumed redistricting is included within the Clause, *see Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Smiley v. Holm*, 285 U.S. 355 (1932), that conclusion requires some departure from the literal meaning of the phrase "Places and Manner of *holding* elections."[7] If one were to approach the Clause as narrowly as Appellant urges, it would not cover redistricting at all. The redrawing of districts does not affect how, where, or whether elections are *held*, but only which candidates run from which districts. In any event, if the Clause captures congressional redistricting, which might be seen as at the periphery of Elections Clause authority, it certainly includes multiple other types of election laws that one might consider at the heart of "Times, Places and Manner of holding elections." All such laws that were passed by initiative are called into question by Appellant's interpretation in this case.

Because Arizona and other states that employ direct democracy prevent state legislatures from overturning popular initiatives, many election laws that have been passed by that method would violate Ap-

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[7] *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1052 n.2 (D. Ariz. 2014).

pellant's interpretation of the Elections Clause. See Ariz. Const. art. IV, pt. 1, § 1(6); Cal. Const. art. II, § 10(c).[8] Try as one might to limit this constitutional theory to independent redistricting commissions or to redistricting, in general, the principle cannot be so easily cabined. If Arizona's redistricting commission is unconstitutional because the legislature did not draw the districts or delegate authority to the commission to do so, so too are the many election law initiatives that were not passed by the legislature and might contradict laws the legislature might pass on its own.

The list of laws that might fall into such a category is quite long. The following are just a sample of the variety of popularly enacted state statutes and constitutional provisions implicated by Appellant's interpretation of the Elections Clause:

- **Voter identification laws**. Miss. Const. art. XII, § 249-A; Ariz. Rev. Stat. Ann. § 16-579.

- **Implementation of voting machines rather than paper ballots**. Ark. Const. amend. 50, § 2.

- **Bans on ballots that provide for automatic party-list voting**. Ohio Const. art. V, § 2(a).

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[8] *See also Comparison of Statewide Initiative Processes 1*, Initiative and Referendum Inst., http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf.

- **Deadlines for voter registration**. Or. Const. art. II, § 2.

- **Residency requirements**. Ohio Const. art. V, § 1.

- **Regulation of primary elections**. Wash. Rev. Code Ann. § 29A.36.170, *as amended* by 2013 Wash. Legis. Serv. Ch. 143 (H.B. 1474). Wash. Initiative 872 (2004).[9]

- **Mail balloting**. Or. Rev. Stat. Ann. § 254.465, *as amended by* 2007 Or. Laws Ch. 154 (S.B. 74).[10]

- **Procedures for filling vacant U.S. Senate seats**. Alaska Stat. Ann. § 15.40.[11]

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[9] Indeed, the direct primary itself was often the subject of early initiatives during the Progressive Era. In Maine, for example, the first successful initiative was the direct primary approved by the voters in 1911. *See* Persily & Anderson, *Regulating Democracy*, at 1023-24. Although most legislatures in this period adopted the direct primary as well, the only three states that did not have the direct primary by 1915 — Connecticut, New Mexico, and Rhode Island — were also states that did not provide for an initiative process.

[10] The original provision for mail balloting in Oregon was passed by initiative. It was later amended by a similar, and more expansive legislative provision.

[11] Because the provision applies only to Senate elections, it implicates the Seventeenth Amendment, rather than the Elections Clause. However, that provision contains a provision that parallels the Elections Clause and would be implicated by Appellant's interpretation. *See* U.S. Const. amend. XVII § 2 ("[T]he legislature of any

The list of endangered state election laws would not end there, however. Almost all state constitutions themselves were passed by convention and ratified by voters at the ballot box — without direct involvement or approval by "the Legislature," as Appellant defines it. Such constitutions often contain original provisions that regulate core aspects of the electoral process, including voter registration,[12] absentee voting,[13] criteria for vote counting and challenges,[14] and victory thresholds,[15] to name just a few. If those provisions conflict with laws passed by the Legislature, then they would be legally void under Appel-

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State may empower the executive thereof to make temporary appointments . . . .).

[12] Many states have constitutional provisions requiring voter registration, or requiring the legislature to provide for registration. *See, e.g*, Miss. Const. art. XII, § 249; N.C. Const. art. VI, § 3; Va. Const. art. II, § 2; W. Va. Const. art. IV, § 12; Wash. Const. art. VI, § 7.

[13] A number of states require absentee voting. *See, e.g.*, Haw. Const. art. II, § 4; La. Const. art XI, § 2; N.D. Const. art. II, § 1; Penn. Const. art. VII, § 14.

[14] *See, e.g.*, Ala. Const. art. VIII, § 185 (laying out procedures for challenging validity of votes); Ark. Const. art. III, § 11 (requiring ballots unlawfully not counted initially to be counted after election); La. Const. art. XI, § 2 (requiring all ballots to be counted publically).

[15] Three states mandate a plurality of votes as the standard for victory in all elections, excluding runoffs. Ariz. Const. art. VII, § 7; Mont. Const. art. IV, § 5; Or. Const. art. II, § 16.

lant's interpretation for the same reasons the Arizona Redistricting Commission would be.[16]

It would be a mistake, however, to consider the importance of direct democracy for electoral reform as limited to the catalog of statutes and constitutional amendments successfully passed through popular initiative. The threat of an initiative hangs over the

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[16] Indeed, even the requirement that votes be taken by "ballot" or "secret ballot," as opposed to *viva voce*, can be found in forty-four existing state constitutions and many of the original ones. See Appellees' br. at Appendix A (assembling state constitutional provisions). For James Madison, the decision "whether the electors should vote by ballot or *viva voce*" was quintessentially one covered by the Elections Clause. See 2 *Records of the Federal Convention* 240 (M. Farrand ed., 1937). *See also* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 71 (J. Elliot 2d ed., 1863) (quoting delegate of the North Carolina ratifying convention as defining "manner" in the Elections Clause as "only enabl[ing] [states] to determine *how* these electors shall elect — whether by ballot, or by vote, or by another way."). Yet even some of the earliest state constitutions, such as the 1776 and 1790 Pennsylvania Constitutions, the 1796 Tennessee Constitution, and the 1812 Louisiana Constitution contained such provisions protecting a secret ballot, thereby placing the manner of voting out of the elected Legislature's reach. Pa. Const. of 1776 ch. II, § 32 (" All elections, whether by the people or general assembly, shall be by ballot"); Pa. Const. of 1790 art. III, § 2 ("All elections shall be by ballot, except those by persons in their representative capacities, who shall vote viva voce."); Tenn. Const. of 1796 art. III, § 3 ("All elections shall be by ballot"); La. Const. of 1812, art. VI, § 13 ("In all elections by the people, and also by the Senate and House of Representatives jointly or separately, the vote shall be given by ballot.").

legislature whenever it considers (or fails to consider) election-related legislation. As such, every regulation of federal elections in an initiative state is influenced directly or indirectly by the availability of direct democracy. *See* Caroline Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies, in Citizens as Legislators: Direct Democracy in the United States* 171 (Shaun Bowler et al., eds., 1998); *see also* Persily and Anderson, at 1006-07; Elizabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 Am. J. Pol. Sci. 99 (1996). An interpretation of the Elections Clause that would restrict the use of direct democracy for purposes of election reform, therefore, would not only diminish the ability of citizens in initiative states to take charge of their democracy directly, but it would also change the behavior and negotiations of legislators who will no longer fear having their legislation overturned or modified by the voters themselves.

CONCLUSION

The jury is still out on the best way to reform the redistricting process in the United States. No consensus exists on how best to deal with a problem that seems to be getting more complex, sophisticated, and intractable each census cycle, as technology for mapmaking and political data-mining advances. Different states are experimenting with institutional alternatives that vary the people, principles, and processes governing redistricting. With time, this experimentation may lead to the discovery of better ways to ensure independence of the people drawing congressional districts or the development of more

effective legal constraints to prevent state legislatures from engaging in well-known abuses of the redistricting process.

What is manifestly not needed at this stage in the investigation of policy alternatives is to cut off experimentation with an unprecedented constitutional rule that greatly limits available options. To do so would consign states to the dysfunctionality of a system where politicians choose their voters rather than voters choosing their politicians. Worse still, the interpretation of the Elections Clause triggering that premature abandonment of ongoing experiments would have consequences well outside the field of redistricting. Indeed, such a move would open an entirely new field of election litigation and call into question a range of state democracy reforms stretching back a century or more.

The judgment of the U.S. District Court for the District of Arizona should be affirmed.

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January 22, 2015

AMICUS CURIAE BRIEF

No. 13-1314

In the Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF JACK N. RAKOVE, RICHARD R. BEEMAN, ALEXANDER KEYSSAR, PETER S. ONUF, AND ROSEMARIE ZAGARRI AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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BRIEF OF JACK N. RAKOVE, RICHARD R. BEEMAN, ALEXANDER KEYSSAR, PETER S. ONUF, AND ROSEMARIE ZAGARRI AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST

Amici curiae are historians whose research interests include the origins and adoption of the Constitution and the evolution of American ideas about political representation, from the colonial era into the early decades of the federal Republic. *Amici curiae* believe that a historical understanding of American ideas of representation and the debate over specific provisions of the Constitution, as conducted by its framers and ratifiers, will assist the Court in considering the issues presented in this case.[1]

Jack N. Rakove is the William Robertson Coe Professor of History and American Studies and Professor of Political Science and (by courtesy) Law at Stanford University. His books include *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996), which received the Pulitzer Prize in History; *The Annotated U.S. Constitution and Declaration of Independence* (2009); and *Revolutionaries* (2010), which was a finalist for the George Washington Prize. He is past president of the Society for the History of the Early American Republic.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' blanket letters consenting to the filing of *amicus* briefs have been filed with the Clerk.

Richard R. Beeman, John Welsh Centennial Professor of History Emeritus at the University of Pennsylvania for forty-seven years, has written and edited thirteen books and several dozen articles on aspects of America's political and constitutional history in the eighteenth and early nineteenth centuries. His recent book, *Plain Honest Men: The Making of the American Constitution* (Random House, 2009), was winner of the George Washington Book Prize and the Literary Award of the Philadelphia Athenaeum. His annotated edition of the Declaration of Independence and U.S. Constitution, *The Penguin Guide to the United States Constitution*, was published in August, 2010. His newest book, *Our Lives, Our Fortunes and Our Sacred Honor: The Forging of American Independence, 1774-1776* (2013), describes the drama that played out within the Continental Congress between, September, 1774 and July 4, 1776.

Alexander Keyssar, the Matthew W. Stirling, Jr. Professor of History and Social Policy at Harvard University and chair of the politics faculty at the Kennedy School of Government, has specialized in historical issues that have contemporary policy implications. In 2000, he published *The Right to Vote: The Contested History of Democracy in the United States*, which received the Beveridge Prize of the American Historical Association for the best book in U.S. history; and was a finalist for the Pulitzer Prize in History and the Los Angeles Times Book Award. His 1986 book, *Out of Work: The First Century of Unemployment in Massachusetts*, was awarded three scholarly prizes and named one of the notable books of the year by the New York Times. He co-authored *The Way of the Ship: America's Maritime History Reenvisioned, 1600-2000* (2008), and *Inventing America* (2003, 2nd ed. 2006), a text integrating the histo-

ry of technology and science into the mainstream of American history. He has also published numerous op-ed articles publications.

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Rosemarie Zagarri is University Professor and Professor of History at George Mason University. She is the author of many books and articles on the founding era of American history, including, *The Politics of Size: Representation in the United States*, 1776-1850 (1987); *A Woman's Dilemma: Mercy Otis Warren and the American Revolution* (1995); and *Revolutionary Backlash: Women and Politics in the Early American Republic* (2007). In 2009-2010 she was President of the Society for Historians of the Early American Republic.

INTRODUCTION AND SUMMARY OF ARGUMENT

A central question raised by this litigation is whether Article I, Section 4 of the Constitution pre-

cludes the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts. Such a commission would certainly have been a novelty to the eighteenth-century adopters of the Constitution. There was no direct precedent then for imagining the modern initiative process in which the people of a state exercise a legislative power that is fully equivalent to the statutory authority of an institutional legislature. The American revolutionaries were, of course, aware of the ways in which ancient and modern city-states had used procedures of direct democracy. But their constitutional experiments in the 1770s and 1780s were primarily concerned with the nature of political representation, operating first at the state and later at the national level of government. They inhabited a political world in which a commitment to the efficacy and indeed the justice of representation outweighed solicitude for the institutional privileges of legislatures.

That commitment is consistent with the concerns that have led the people of Arizona to transfer the specific power of redistricting from the institutional legislature to an independent commission. Eighteenth-century Americans understood that specific powers could be reassigned from one department of government to another. They also believed that the people themselves were the originating source of all the power of government. They were the true sovereign in the American understanding of republican government. It was fully within their power to relocate this authority from a state legislature that was perceived to have wielded it for politically improper purposes.

Claims about the adequacy of representation formed a significant point of controversy in the imperial debate of the late 1760s and early 1770s. The issue was not merely that Americans refused to accept the legislative sovereignty of a Parliament in which they were not actually represented. It was also that colonists shared the widely held view that the vaunted British constitution was also defective because too many members of the House of Commons sat for "rotten" and "pocket" boroughs that did not accurately represent the British people as a whole. Drawing upon ideas that had flourished in England during the 1640s, Americans held that a representative assembly—particularly the lower house of a bicameral legislature—should be a mirror or a miniature of the larger society. The conviction that Americans were indeed effectively or actually represented in their provincial legislatures, while Britons were so inadequately represented in Parliament, contributed to the American movement toward independence by identifying a profound difference in government between these two parts of the empire. The Americans were a people who practiced a system of "actual" representation that tied lawmakers and constituents closely together, while Britain relied on a system of "virtual representation" in which members of Parliament bore little responsibility to their constituencies.

With the adoption of new constitutions after 1776, Americans perfected this practice within the individual states. While authority flowed decisively toward the new legislatures, state declarations of rights affirmed that lawmakers should regularly return to the "private station" of citizen, the better to feel the impact of the laws they had enacted. Moreover, whenever the people concluded that government

was failing to answer its essential responsibilities, they retained the "indubitable, unalienable, indefeasible right, to reform, alter, or abolish it." Virginia Declaration of Rights Art. 3 (1776), 1 *Founders' Constitution* 6 (1987)). In the years after 1776, mounting dissatisfaction with the performance of the state legislatures marked a leading edge of the movement that culminated in the Federal Convention of 1787.

In 1787, as in 1776, Americans believed that the lower house of a legislature should closely resemble the larger society. That concern influenced the framing of the Times, Places, and Manner Clause (Article I, Section 4) of the Constitution. This clause was partly intended to deal with the potential danger of recalcitrant states refusing to fulfill their constitutional duty to provide for the legal election of members of Congress. But as the remarks of the clause's leading advocates, notably James Madison and Rufus King, indicate, the framers actively worried that state legislatures would misuse their authority in inequitable ways, significantly favoring some voters and disfavoring others. A concern with what we now call the one person, one vote principle of equal representation and the manipulation of the design of electoral districts for factious purposes was present in these debates, and it justified reducing the residual authority of the state legislatures over elections.[2]

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[2] Strikingly, James Madison was not only the first victim of term limits within the Continental Congress but also, in 1788, the first object of the practice later called gerrymandering (after his second Vice-President, Elbridge Gerry) when Patrick Henry, his great nemesis in Virginia politics, designed a congressional district that placed Madison's home county of Orange in what promised to be an Anti-Federalist-dominated seat.

The Times, Places, and Manner Clause proved a significant source of controversy during the ratification debates of 1787-1788. Some of this controversy reflected familiar motifs in the quarrel between Federalists and Anti-Federalists. The latter repeatedly predicted that Congress would deprive the mass of citizens of the suffrage by requiring voters for the House of Representatives to travel to distant corners of their states to cast their ballots. Anti-Federalists, however, said little about the sovereign rights of the state legislatures per se; they were more troubled by the array of abuses members of Congress could perpetrate, including arbitrarily lengthening their own terms of office. Federalists (again including Madison and King) stressed the problem of state noncompliance with their constitutional duty, but also identified other ways in which the state legislatures might threaten the political equality of citizens. In a few instances, Federalists even wondered whether senators would find ways to collude with their own electors in the state legislatures to weaken the popular right of representation in the lower House.

Anti-Federalists proposed amending the Constitution so that the congressional power to alter state "Regulations" would be exercised only when states refused to provide for the election of the House of Representatives; but the dominant Federalists refused to include this proposal in the amendments sent to the states in 1789. In the constitutional debates of the late 1780s, explicit efforts were made to restrict the operation of this clause to occasions when the states overtly refused or failed to comply with their duty to arrange for the election of members of Congress. Those efforts failed, and Federalists triumphantly vindicated a national power to oversee electoral questions that itself drew upon Americans'

commitment, dating at least to the 1760s, to maintaining a just system of political representation.

Beyond the controversy over Section 4, the ratification debates involved one other major subject that relates to the current controversy over the propriety of independent commissions exercising a legislative power over redistricting. In legitimating both the replacement of the amendment rules of the Articles of Confederation through the calling of popularly elected state conventions and the fundamental shift the Constitution made in the federal system, Federalists repeatedly evoked a doctrine of popular sovereignty that made the people themselves the primary source of constitutional authority. Following arguments best laid down by James Wilson of Pennsylvania, Federalists argued that the people always retained the right to "reform, alter, or abolish" existing forms of government. Acting at the federal level, they could reallocate authority between the Union and the States, as Article I, Section 4 promised to do in the realm of congressional elections. But the people could also do so within the boundaries of their own states. As the sovereign sources of the legal authority of their own governments, they retained a fundamental right to determine which institutions would exercise which powers. They were free to define how the legislative power of society would be formed. If they wished, they could restore the legislative veto to the executive. If circumstances warranted, a sovereign people could also shift specific legislative powers to other institutions.

Thus, while a specific conception of the people of a state establishing independent commissions through the initiative process was not yet available to Americans, the recognition of their capacity to al-

locate legislative power as they wished was consistent with the founding values of the Republic.

ARGUMENT

I. American ideas about the value of attaining proper and just forms of representation in a legislature were deeply embedded in the revolutionary controversy of 1765-1776.

When the framers of the Constitution took up the composition of the House of Representatives in 1787, they had no compelling precedent for the election of its members. In Britain the composition of the House of Commons rested on the tradition of two members for every county and the granting of the right of representation to chartered boroughs and other corporations. In the American colonies, representation was routinely given to legally defined communities—townships or counties—as they were organized. But because the framers intended to create a national legislature smaller than either the state legislatures or the House of Commons, they could not rely on these examples. Members of the House of Representatives could be elected either as statewide delegations or in artificial districts that would have no other legal purpose or political function. One could also imagine a hybrid system in which citizens across a state could vote for members of each of its individual districts. There was, in short, a great deal of experimental uncertainty over the election and composition of the House of Representatives. Jack Rakove, *The Structure of Politics at the Accession of George Washington*, in Richard Beeman et al. eds., *Beyond Confederation: Origins of the Constitution and American National Identity* 288-289 (1987).

Nevertheless, American ideas about representation rested on a rich tradition of historical practice and political controversy, particularly the quarrel with Great Britain that erupted with the Stamp Act (1765). In that dispute, advocates for the British government argued that the colonists were "virtually" represented in Parliament, even though no Americans sat in the House of Commons. Numerous communities in Britain did not send members to the Commons, yet were legally bound by its decisions. Americans dismissed these claims scornfully. As the Massachusetts radical James Otis pointedly asked, "To what purpose is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham, and Sheffield, which return no members? If those, now so considerable, places are not represented, they ought to be." James Otis, *Considerations on Behalf of the Colonists* (1765), quoted in Bernard Bailyn, *Ideological Origins of the American Revolution* 169 (1992).

In rejecting these claims, the colonists were well aware of the manifest deficiencies of representation in Britain. Those deficiencies were not a novelty in 1765: John Locke, for example, had alluded to them in his *Second Treatise of Government* (1690). John Locke, *Two Treatises of Government*, Sec. 157, at 372-373 (Peter Laslett ed. 1960, 1988). Americans were drawn to the view that Britain's vaunted constitution was, in fact, decaying. Too many members of the Commons sat for "rotten boroughs" with few voters or "pocket boroughs" in which electors were easily controlled by a dominant government or aristocratic interest. Even during the Stamp Act disputes, some members of Parliament, notably including William Pitt, freely criticized the inadequacies of representation in the House of Commons and agreed

that Americans could not be taxed by a legislature in which they held no seats. By contrast, Americans knew that in their societies new communities regularly received the right of representation, while the limitations on the suffrage that sharply constricted the British electorate had only a modest impact in the colonies. See generally Bailyn, *Ideological Origins*, at 161-175.

Drawing upon ideas that originated during the mid-seventeenth-century English civil war and Commonwealth, the colonists agreed that a proper legislative assembly should closely resemble the society from which it was drawn. See Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (2014) at 71-75. As John Adams observed in his *Thoughts on Government* 10 (1776), "The principal Difficulty lies, and the greatest Care should be employed in constituting this representative assembly. It should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them." Such an assembly, Adams added, should provide "an equal Representation of the People, or, in other Words, equal Interests among the People, Should have equal Interests in the Representative Body." 1 *Founders' Constitution*, at 108. These concerns, drawing on distant English sources, became a commonplace for the American revolutionaries after 1776, to be repeated during the constitutional debates of 1787-1788. See Rakove, *Original Meanings*, at 203-205.

This conscious attachment to the differences in American and British practices of representation had two significant consequences for the course of the Revolution.

First, it sharpened colonial convictions about the extent of the quarrel between Britain and America. In the mother country, representation had become a corrupt, influence-driven process, working to the advantage of a Crown and ministry that dominated the government. By contrast, Americans conceived political representation as a process that should narrow the distance between voters and legislators, leaving representatives directly receptive to the concerns and even the instructions of their electors, and turning the legislative assembly into a miniature of the larger society. Where British members of Parliament were urged, in the words of Edmund Burke, to think of themselves as "a *deliberative* assembly of *one* nation, with *one* interest, that of the whole," American norms and practices pointed in a different direction, toward the idea that representatives were essentially attorneys for their constituents' interests and preferences. Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 1 *Founders' Constitution*, at 394; Bailyn, *Ideological Origins*, at 162-165.

Second, this commitment to principles of equal representation identifies a critical theme in American norms of self-government. In the constitutional quarrel with Britain, the colonists treated their individual legislative assemblies as the virtual equivalent of Parliament, as possessors of legislative sovereignty within their own jurisdictions. In the years before 1776, Americans principally struggled to have their provincial assemblies treated as mini-versions of Parliament. But after 1776, for purposes of their own governance, the American belief in the superiority of their practice of representation also exposed the state legislatures to pressure from below, making the legislatures' claim to legal sovereignty subject to new demands and pressures that had not been ex-

pressed previously. The more these demands were expressed, the more difficult it became to treat the legislatures as the true locus of a state's sovereignty.

II. In the decade after 1776, political developments within the states increasingly supported the idea that sovereignty rested not in the government of the states but among the people themselves.

There is no question that the new state legislatures created in 1776 became the principal repository of the sovereign authority of republican government. Although the executive and judicial branches of government gained full departmental independence, they were the weaker branches, decidedly inferior in authority to the politically dominant legislature. Even so, over the course of the next decade a wide array of developments operated to weaken the primary stature of the state legislatures.

The belief that state legislatures were only trustees of the people's authority, rather than the sovereign source of law that had effectively supplanted the king, was evident in the declarations of rights that often accompanied the constitutions. Statements of principle found in the Virginia constitution of May 1776 are paradigmatic. While the Virginia constitution itself imposed no term limits on legislators, Article 5 of the Declaration of Rights affirmed the principle of rotation in office: "that the members of [the Legislative and Executive powers of the State] may be restrained from oppression, by feeling and participating [in] the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the

former members, to be again eligible, or ineligible, as the law shall direct." 1 *Founders' Constitution*, at 6. More generally, a staple maxim of revolutionary-era politics held that "when annual elections end, slavery begins." Here again the American reliance on the efficacy of representative government ran at least as strong as the belief in legislative supremacy.

In the decade after 1776, constitutional developments within the states further illustrated the dilution of legislative supremacy. Although the constitutions written in 1776 limited the executive to annual terms while depriving governors of their veto—a power royal governors long wielded—the New York constitution of 1777 and the Massachusetts constitution of 1780 restored the veto to the executive while enabling governors to be elected at large by the people. Section 15 of the Pennsylvania Constitution of 1776 required pending bills to be "printed for the consideration of the people" and ideally to be held over until the next session of the assembly before enactment. Massachusetts also pioneered the concept of assembling a separate convention to frame a constitution that would then be submitted to the people for ratification. That development arose only after its legislature attempted to promulgate a constitution it had written, sparking opposition from many Massachusetts towns. See generally Rakove, *Original Meanings*, at 96-101; Gordon Wood, *The Creation of the American Republic, 1776-1787* 339-341 (1969). Moreover, the concept of the judicial review of legislation began to emerge, slowly but potently, within the states. Taken together, these developments indicated a growing movement away from the concept of legislative sovereignty within the individual states.

Beyond these constitutional developments, there is ample evidence of the growth of an early form of political populism after 1776. The distinguished historian Gordon Wood explores this development at length in his epochal work, *The Creation of the American Republic, 1776-1787*. In the mid-1780s the greatest challenge to the sovereignty of the states came, Wood argues, not from nationalists eager to augment the authority of the Continental Congress, but rather "from below, that is, from the repeated and intensifying denials by various groups that the state legislatures adequately spoke for the people * * * . In the contest between the states and the Congress the ideological momentum of the Revolution lay with the states; but in the contest between the people and the state governments it decidedly lay with the people." Wood, *Creation of the American Republic*, at 362.[3]

By 1787, the idea that sovereignty vested in the people rather than the state governments became a potent weapon for the Federalist movement. An appeal to popular sovereignty could enable the Federal Convention to circumvent the formal amendment requirements of the Articles of Confederation, which required changes to be approved by a vote of all thirteen legislatures. Equally important, an attack on the concept of the states' legislative sovereignty would facilitate the transfer of authority from the states to the Union.

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[3] More generally, the analysis presented here draws extensively on Wood, *Creation of the American Republic*, at 306-389.

III. In diminishing the sovereign authority of the state legislatures by proposing the Times, Places, and Manner Clause, the framers of the Constitution were seeking to protect fundamental norms of equal representation.

The Times, Places, and Manner Clause originated in the Committee of Detail that met from July 26-August 5, 1787, charged with the task of converting the general resolutions the Convention had adopted thus far into the text of a working constitution. The Committee exercised a great deal of initiative, and its proposals significantly advanced the work of the Convention. In early drafts of this clause, the Committee provided that the time, place, and manner of holding elections for both houses would be "prescribed" by the state legislatures, but that these "Provisions" could be "altered or superseded" by Congress. The final report the Committee presented to the Convention on August 6 reduced the supervisory power of Congress to "altered." II Max Farrand ed., *Records of the Federal Convention of 1787* 139, 153, 155, 165, 179 (1937) [hereafter RFC].

The clause was actively debated on August 9. The convention first rejected a motion from James Madison and Gouverneur Morris to exempt the Senate from the clause. It then unanimously accepted the first part of the clause, validating the authority of the state legislatures, and turned to the second half, dealing with the supervisory authority of Congress. Two South Carolina delegates, Charles Pinckney and John Rutledge, moved to delete this part of the clause, and five delegates responded in its defense. II RFC, at 239-241.

The lengthiest and most comprehensive defense came (at least according to his own notes) from Madison. His speech deserves careful consideration, because it extended well beyond the possibility that jealous state legislatures might simply try to cripple Congress by refusing to arrange for elections. Madison began by noting that the very fact that the House would be elected by the people rather than the state legislatures indicated that the framers already agreed that "the result will be somewhat influenced by the mode" of election. It was the people who were meant to be represented, not the legislatures. That consideration alone justified recognizing "that the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections." Moreover, Madison continued,

> These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures, and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was

> presumable that the Counties having the power in the former case would secure it to themselves in the latter.

II RFC, at 240-241.

The various concerns that Madison identified in this speech read the Times, Places, and Manner Clause as broadly as its language could possibly be interpreted. This analysis covered not only the ways in which voters would register their individual preferences, but also the entire framework by which a state would choose how its people would be represented. Madison assumed that existing inequalities in the composition of the state legislatures would produce comparable inequalities in the federal House. He also worried that state legislatures would seek to "mould" the electoral process, not to enable the people to secure the best representation for themselves, but to advance the legislature's own "favorite measure."

Madison's comments reflect the animus against the state legislatures that shaped his constitutional thinking in 1787. That attitude was clearly expressed in the documents drafted prior to the Convention. His April 1787 memorandum on the Vices of the Political System of the United States was a running indictment of state legislatures, which he faulted not only for their failure to implement the decisions of the Continental Congress, but also for the "multiplicity," "mutability," and worst, the "injustice" of their own legislation. 1 *Founders' Constitution* at 166-169. Madison was no defender of the residual sovereignty of the state legislatures, and his justification of the Times, Places, and Manner Clause was

fully consistent with that position.[4] By default, the state legislatures remained the most obvious and convenient institution for drafting appropriate regulations for congressional elections. But their judgment and preferences did not provide a sufficient basis for determining whether their citizens were indeed being adequately represented. Congressional supervision was necessary, not only to ensure that each state would remain represented in the national legislature, but also to improve (or one could say, perfect) the basis on which the electorate would be represented. This was a matter of justice as well as necessity, and Congress should be empowered to trench on state legislative authority to attain these ends.

One could question how well Madison's views represented those of other framers. None of the other four speakers on August 9 went as far as he did in identifying the potential uses of the clause. But neither did Madison record anyone opposing his views. Instead, the Convention rejected the motion from Pinckney and Rutledge. It then accepted a new change in wording proposed by George Read of Delaware, replacing the phrase "provisions concerning them may, at any time, be altered by the Legislature of the United States" with "regulations, in each of the foregoing cases may at any time, be made or al-

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[4] As numerous Madison scholars have noted, his favorite proposal for the Constitution was to give the national legislature a negative on state laws, to be used at least to protect national laws against the interference of the states, but also, he hoped, to enable the national government to protect minorities within the states against unjust legislation. Had that measure been accepted, the idea that states retained legislative sovereignty would have grown absurd.

tered" by Congress. "This was meant to give the Natl. Legislature a power not only to alter the provisions of the States, but to make regulations in case the States should fail or refuse altogether." II RFC, at 242. The addition of "made" clearly implied that Congress had its own authority to initiate a wide array of electoral "regulations" independent of any prior action by the states.

This discussion largely determined the substance of the clause. Two changes were made, however, in the final days of the Convention. First, the Committee of Style revised the second part of the clause to read: "but the Congress may at any time by law make or alter such regulations." II RFC, at 592. Second, on September 14 the Convention unanimously added the phrase, "except as to the places of choosing Senators" at the very end of the clause, "in order to exempt the seats of Govt in the States from the power of Congress." *Id.* at 613.

Along with the Militia Clause of Article I, Section 8, the Times, Places, and Manner Clause was one of two provisions that explicitly authorized Congress to override or preempt a legislative power that states would ordinarily exercise. In this sense, it derogated from the residual sovereignty of the state legislatures, not as much as Madison's proposed negative on state laws would have done, but still in a realm of governance that dealt with a fundamental political characteristic of the states. As Madison's August 9 speech strongly indicates, the rationale for this provision extended beyond the necessity of denying the state governments the capacity to prevent the national legislature from meeting. Discussions of the mode of voting, or the different ways in which a state's delegation would be constituted, or the value

of protecting equality among the citizens all evoked longstanding American concerns with the substance and quality of representation, rather than the value of preserving a traditional legislative power for its own sake.

IV. The ratification debates of 1787-1788 confirm that concerns relating to the possible manipulation of congressional elections by the state legislatures continued to shape the interpretation of the Times, Places, and Manner Clause.

Article I, Section 4 proved to be a controversial feature of the Constitution during the ratification debates of 1787-1788. Starting with Massachusetts in January 1788, six states recommended its amendment. The typical formulation of these amendments would limit the congressional exercise of its power to "make or alter" election regulations to occasions when a state legislature "shall neglect or refuse to make Laws or Regulations for the purpose" or when some other event ("invasion or rebellion") would leave it "disabled" from acting. 10 Virginia Amendments to the Constitution, June 27, 1788, *Documentary History of the Ratification of the Constitution*, 1555 (1976) [hereafter DHRC]. In two cases, however—Massachusetts and New Hampshire—Congress would also have been authorized to act when a state "shall make regulations subversive of the rights of the people to a free & equal representation to Congress." Massachusetts Ratification, February 6, 1788, 6 DHRC, at 1469. Here, again, a concern with the purposes of political representation

would trump the sovereignty claims of a state legislature.[5]

Much of the debate over the clause rested on scenarios that are irrelevant to the concerns of this litigation. Anti-Federalists and Federalists speculated freely over the possibility that either Congress or the legislatures would enact laws requiring voters to travel enormous distances to cast their ballots in polling places situated in some far isolated precinct of a state. Pennsylvania voters might have to schlep their way to the shores of Lake Erie, where their commonwealth then owned only a bare strip of beachfront, while citizens of Massachusetts might have to wend their way either to Great-Barrington, near its western boundary with New York, or to Machias, which now sits in far northeastern Maine. 7 DHRC, at 1398-99. George Mason warned Virginians that even if the state should be divided into ten electoral districts, "as Gentlemen say (and in which I accord in all my heart," Congress might still require voters to cast their ballots in Norfolk, in the state's far southeastern corner. 10 DHRC, at 1291.

Less sensationally, numerous comments made during the ratification debate focused on the possibility that state legislatures would balk at holding elections. The specter of defiant states provided the most obvious reason for vesting this power in Congress. Federalists and Anti-Federalists batted this danger back and forth in terms that often echoed the rhetorical excesses of the ratification debate. The most extreme comments made by Anti-Federalists suggested that Congress could use its power to evade other con-

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[5] For the New York ratification convention's variation on this amendment, see 23 DHRC, at 2330-2331.

stitutional rules, manipulating its control over the time and manner of elections to convert fixed congressional terms into lifetime positions

Within this debate, however, some speakers in the state conventions did touch on issues that related more directly to fundamental principles of equal representation. In Massachusetts, where two days went to discussing this clause, several speakers argued that the clause was essential to enable the lower House, "the democratick branch of the national government, the branch chosen immediately by the people," to act as "a check on the federal branch." Without oversight by the House, the federal Senate might well collaborate with the state legislatures to "at first diminish, and finally annihilate that controul of the general government, which the people ought always to have through their immediate representatives." 6 DHRC, at 1217. Judge Francis Dana, formerly the American minister to Tsarina Catherine, told the convention that he was initially skeptical of the clause, but now saw its merits. "A State may make provision, but it may not be agreeable to the spirit of the Federal Constitution," Dana observed. "It is not enough that a State sends its complement of representatives, but all the people ought to have equal influence, and the State regulation is unequal and unjust." *Id.* at 1232.

Rufus King soon developed this point at greater length. The danger of inequality in representation was evident in several states. In neighboring Connecticut, representation in the state legislature was given solely to town corporations, independent of population. Rhode Island was widely believed to be preparing to adopt the same rule. Worse examples might be found in the southern states. In South Car-

olina there had been enormous growth in the backcountry. But that population's requests for greater representation were effectively blocked by the thirty members who sat for Charleston, out of all proportion to its relative population. *Id.* at 1279. In the Virginia convention, Madison pointed to South Carolina to illustrate a broader lesson. "Some States might regulate the elections on the principles of equality, and others might regulate them otherwise," Madison observed. "This diversity would be obviously unjust."

This concern with promoting norms of democratic equality thus remained part of the framework within which the framers and their Federalist supporters conceived the purposes of Article I, Section 4. One element of this concern was clearly addressed to the eighteenth-century equivalent of our modern notion of one person, one vote, and the conviction that electoral districts should be of equal size. But the political universe of the American revolutionaries was also filled with images of the way in which processes of deliberation and representation were subject to corruption. That was one of the great legacies they inherited from their pre-1776 belief that both the British House of Commons and the British electorate were the victims of multiple forms of corruption that had sapped the independence of Parliament and prevented it from performing its constitutional duties.

It is noteworthy that Madison and King acted as both framers and ratifiers of the Constitution. Both spoke during the August 9, 1787 debate on the clause, and both made similar remarks in the ratification conventions. There is, of course, no mechanism available to measure exactly how representative their opinions were (though Madison admittedly enjoys some deserved prestige in the adoption of the

Constitution). Nevertheless, the belief that the purposes of the clause transcended the unlikely scenario of recalcitrant states simply blocking the election of congressional delegations was manifestly one element—and hardly a trivial one—in the support that Federalists gave to the clause as written. The commitment of the dominant Federalists to protecting the substantive purposes of the representation of the people, rather than a desire to minimize the potential insult to the residual sovereignty of the state legislatures, remained the driving force in the ratification debates.

Had Federalists not held this position, or had he not felt so strongly about this issue, Madison could easily have included a conciliatory response to Anti-Federalist criticisms in the amendments he proposed to the House of Representatives on June 8, 1789. Madison did include two other measures relating to the election of the House of Representatives, and Congress ultimately included both in the twelve amendments it sent to the states in September 1789. However, on August 21, as the House was near the close of its deliberations on amendments, Aedaenus Burke of South Carolina introduced a revised version of the Times, Places, and Manner Clause based on the states' recommended amendments. Burke's proposal would restrict congressional power to those occasions when "any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such election." The ensuing debate recapitulated the arguments made during the ratification debates. By a vote of 28-23, the House rejected Burke's amendment. 1 *Gayles and Seaton's Debates and Proceedings* 797-802 (1825).

Over the two years separating the report of the Committee of Detail of August 6, 1787, from the deliberations of the First Congress over constitutional amendments, the Times, Places, and Manner Clause remained a subject of active contestation. Two alternatives were repeatedly available to the framers, ratifiers, and the amenders of the Constitution: to restrict its operation only to occasions when the state legislatures manifestly defaulted on their constitutional duty, or to enable the new Congress to judge just how well different election schemes framed by the states were fulfilling deeper objectives of political representation. Although some state conventions had favored the former option, it failed to gain political acceptance. The dominant Federalist viewpoint instead prevailed. The substantive purposes of representation remained far more important than the legislative privileges of the states.

V. The ideas of popular sovereignty that coalesced in the United States in the late 1780s are fully consistent with the capacity of the people of a state, using the modern initiative process, to delegate a particular legislative power to an independent commission.

Beyond the specific discussions of the Times, Places, and Manner Clause, the ratification debates of 1787-1788 are relevant to the questions posed in this litigation in one further, critically important respect. The residual sovereignty of the state legislatures became vulnerable not only to limitations from above—that is, from assertions of federal supremacy over state legislation. It also became susceptible to modification from below—that is, from the idea that the people themselves, as the original possessors of

the sovereign authority of a republican polity, always remained free to reallocate the powers of government as they wished. Within both the individual states and the federal republic, the people became the ultimate sources of the delegated authority their governments exercised in their name. The highly creative development of American constitutional thinking in the long decade after 1776 had the effect of converting a somewhat abstract belief in the natural right of a people to "alter and abolish government" into a potent doctrine that now proved fundamental to the very form and substance of American constitutionalism. Once this doctrine was propounded and accepted, it could be applied to multiple purposes, including eventually the invention of the initiative process as a constructive response to the conviction that state legislatures no longer provided the best representation of a people's collective interests.

There were multiple sources for the transformation of the concept of popular sovereignty from abstract principle to constitutional doctrine. One came from the development of the distinctive American definition of a constitution as supreme fundamental law, contained in a document written by a specially appointed convention and then ratified through some direct expression of the popular will. Another evolved from the process that Gordon Wood has called "the disintegration of representation," a term that denotes the erosion of popular confidence in the capacity of effective governance by the revolutionary state legislatures. Wood, *Creation of the American Republic*, at 363-383.

The constitutional debates of the late 1780s advanced and crystallized this development in several substantial ways.

First, the framers of the Constitution and their Federalist supporters agreed that an appeal to the popular sovereignty of the people, as expressed through the ratification conventions in the separate states, would overcome any doubts about the abandonment of the amendment rules of the Articles of Confederation. This calculation gained decisive support throughout the states. Twelve of the thirteen legislatures enacted laws for the election of convention delegates, while Rhode Island, the one state not present at the Federal Convention, went the other states one better by submitting the proposed Constitution to a popular referendum. Rakove, *Original Meanings*, at 102-108.

Second, popularly elected ratification conventions provided a legal solution to the vexing problem of *quod leges posteriors priores contrarias abrogant.*[6] If the state constitutions (prior to Massachusetts) and the Articles of Confederation had received only legislative approval, as had been the case, then later meetings of the state legislatures remained free to ignore or violate their antecedents' constitutional commitments, as one legislature cannot bind a later one. By resting the authority of the proposed Constitution on the ratification conventions, which assembled for one purpose alone, rather than the legislatures, the framers and the Federalists established a sound theoretical foundation for the legal supremacy of the Constitution expressed generally in Article VI, and more pointedly in Article I, Section 4.

Third, and most important, this new conception of popular sovereignty offered a paradigmatic solu-

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[6] Or, later laws [statutes] contradicting earlier ones, abrogate them.

tion to the problem of federalism. Anti-Federalists repeatedly described the proposed Constitution as a vehicle for the consolidation of the federal union, with its diverse member states, into one concentrated government. There was some dispute as to how this consolidation would occur. Some Anti-Federalists argued that consolidation would occur simply because the national government, with its own three departments, would act directly on the American people, rather than having to work through the states. Others imagined an ongoing competition for power between the Union and the states that would end only when the national government prevailed and the states were left as empty jurisdictions, doing little more than holding elections under the condescending terms of the Times, Places, and Manner Clause. No polity could survive, Anti-Federalists argued, on the detested principle of *imperium in imperio* (a state within a state, or two claimants striving for sovereignty against each other). In either case, Anti-Federalists assumed that sovereignty would have to reside in one body or the other, but not in both. Rakove, *Original Meanings*, at 181-184.

The decisive refutation of this argument came from James Wilson, future member of the first Supreme Court, active member of the Pennsylvania delegation to the Federal Convention, and conspicuous leader of the dominant Federalist majority at his state's ratification convention. In a major speech to the state convention that soon became the basis of Federalist orthodoxy, Wilson challenged the existing conception of sovereignty. It was a mistake, he argued, to imagine that sovereignty, properly defined, belonged to government. In the American system, sovereignty belonged to the people themselves. They

could decide, and re-decide, how much power to allocate to the national government, how much to the states. "[I]n this country, the supreme, absolute, and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the state governments; but that the fee simple continues, resides, and remains with the body of the people." 2 DHRC, at 473) Wilson supported this claim by invoking the Declaration of Independence, with its Lockean statement of "the RIGHT of the people, to alter or to abolish" any form of government. See generally Wood, *Creation of the American Republic*, at 524-543.

Wilson's reformulation of the problem of sovereignty is noteworthy in several respects. First, to some extent Wilson was preserving the traditional definition of sovereignty as an "absolute, and uncontrollable" form of power—a definition traceable to Jean Bodin and Thomas Hobbes, but also present in the writings of Sir William Blackstone. Sovereignty in this sense remains unitary in nature; it can only be found in one location. But second, Wilson shifts that location from government to the people themselves, and allows it to be expressed only through the deposit of individual sovereign powers in different levels or branches of government. The people's sovereignty appears when they consent to fundamental constitutional arrangements, including the division of power between national and state governments. In this sense Wilson was illustrating this Court's well-known description of the capacity of American federalism to "split the atom of sovereignty." *U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Third, Wilson imagines the constitutional exercise of popular sovereignty as an ongoing although episodic endeavor. "It is true the

exercise of this power will not probably be so frequent, nor resorted to on so many occasions in one case as in the other." 2 DHRC, at 473). The power may well lie dormant for long periods, but it never disappears.

Writing within the context of the debates of 1787-1788, Wilson was primarily concerned with refuting the charge that the Constitution would erode or destroy the states' sovereignty. But this doctrine, which other Federalists rapidly embraced, was as applicable to the states' internal governance as it was to the problem of federalism. Just as the American people were free to reallocate power between the national government and the states, so the people of Pennsylvania remained free to reconsider the design of their own constitution. That is exactly what they did in 1790, when the radically democratic constitution the state had adopted in 1776 was replaced by a new text that brought it much closer to the prevailing forms of American constitutionalism.[7]

The development of the initiative process was not, of course, a method of governance that Wilson could have actively considered in 1787. Nor was he then immediately concerned with discussing the internal governance of a state. But the idea that the sovereign people of a state might transfer the politi-

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[7] One significant achievement of the 1790 constitution was thus to convert the Pennsylvania assembly into a bicameral legislature. But had the people of Pennsylvania decided to create an independent commission to conduct the work of redistricting, that would have been a legitimate exercise of their sovereign power, because they would have entrusted this legislative power to a special institution, just as they had once created a Council of Censors to monitor deviations from their original (and deeply controversial) constitution of 1776.

cally charged task of ensuring their representation from a legislature whose workings they had come to distrust to an independent commission was fully consistent with the authoritative theory of popular sovereignty he laid down. Given the political context of 1787-1788, when the victorious Federalists were heaping so much obloquy on state legislatures, the idea of creating an independent commission to perform such a task would not have been inconsistent with this theory of the people's ultimate capacity to act constitutionally.

VI. The invention of the initiative process is substantially consistent with the founding generation's deeper understanding of the nature of delegated political authority, in which the power to legislate transcended the institutional legislature.

Wilson's definitive restatement of the doctrine of popular sovereignty carries special importance for its resolution of the peculiar problem posed by the innate character of American federalism. Yet this conception of the people's ultimate sovereignty also echoed themes that were already circulating in the Anglo-American constitutional tradition well before the momentous developments of 1787-1788. John Locke offered a definitive statement of the people's right to alter government as they wished in § 149 of the *Second Treatise of Government*. There was no question, Locke observed, that the legislative power was the highest (or "supreme") power of government,

> yet the Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust re-

> posed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.

John Locke, *Second Treatise of Government* 367 (Laslett ed. 1964)

It is essential to note that Locke here speaks, not of the *legislature* as an institution, but of *legislative* power per se. That is the trust being delegated. It is the authority to make law, rather than the institutional contrivance of a legislature, that matters. When seventeenth- and eighteenth-century commentators spoke about legislative power, they were not merely reducing the authority to make law to a single institution. Their entire theory of government, which Locke so ably expressed, rested on the conviction that legislatures were a substitute for the people themselves. Of course, legislatures might well improve upon the deliberations the people at large might conduct. (This was manifestly James Madison's position in 1787-1788.) But the legislative powers that the people delegated always remained subject to popular review. And where the American constitutions offered the people mechanisms for revising this trust, and where the people's mature judgment led them to conclude that an institution was not operating optimally, the persistence of the states as autonomous jurisdictions permitted the people to reconstitute the trust of legislative power in new ways.

The great shift from Locke's era of resistance against arbitrary government to Madison's and Wil-

son's era of creative constitution making pivoted, in critical respects, on the ways in which a people could convey that trust. The Glorious Revolution of 1688-1689 confirmed the disputed principle of legislative supremacy while prohibiting the Crown from making law of its own willful authority. But it did not establish a new basis for erecting constitutional government. The American Revolution, however, did just that, first at the state level in the mid-1770s, and then nationally in the late 1780s. An event that Locke could only describe by reference to a distant state of nature became, in American hands, a workable set of procedures for distinguishing a constitution from ordinary law and conceiving how such a document could be amended over time.

In this process, Americans also learned to think more critically about the nature of the powers they were delegating and distributing among institutions. They entered the process of constitution making as faithful readers of Montesquieu's recent separation of the three departments of domestic governance: legislative, executive, and judicial. Their state constitutions and declarations of rights affirmed the principle that these three forms of powers should be kept separate and distinct. See Massachusetts Declaration of Rights Art. XXX (1780), 1 *Founders' Constitution*, at 13-14. But as Madison explained with some care in *The Federalist* No. 47, there were numerous ways in which the actual distribution of specific powers in the American constitutions did not conform to Montesquieu's broad dictum. Powers could be distributed among the branches of government in less tidy ways. They could also be reclassified in their very nature. As Article I, Section 8 of the federal Constitution readily confirms, powers long deemed

part of the royal prerogative in Britain became legislative in the United States.

All of this is consistent with the profound residual authority of the people to "alter the Legislative" when they conclude, through the well-defined procedures of the initiative, that a legislature's manipulation of its redistricting power is no longer adequately expressing their need for a just representation. For this reason, the decision by the people of Arizona to establish an independent redistricting commission is fully consistent with the political values underlying the Constitution, even if the legislative initiative had yet to be conceived in the 1780s.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-1314

IN THE

Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

On Direct Appeal from the United States District Court for the District of Arizona

BRIEF OF SCHOLARS AND HISTORIANS OF CONGRESSIONAL REDISTRICTING AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF THE *AMICI* [1]

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[1] Pursuant to Supreme Court Rule 37.3, *amici curiae* certify that all parties have consented to the filing of this brief through letters from the parties on file with the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief, in whole or in part, and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation or submission.

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As recognized leaders in the fields of election law and the historical regulation of the law of democracy, with substantial expertise in voting rights and redistricting, *amici curiae* strongly believe that this Court should resolve the instant dispute through reference to and interpretation of the governing federal statute, rather than addressing the scope and meaning of the Elections Clause where it is unnecessary to do so. Pursuant to 2 U.S.C. § 2a(c), the judgment of the three-judge court below should be affirmed.

SUMMARY OF THE ARGUMENT

Article I, § 4 of the Constitution—known as the Elections Clause—states that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The Elections Clause thereby establishes a basic federalist

structure: States are given the default responsibility to regulate federal elections until, but only until, Congress intercedes.

This case concerns a sovereign State's choice of procedure and institution for drawing district lines for federal elections. Federal redistricting is covered by the Elections Clause. *See Branch v. Smith*, 538 U.S. 254, 266 (2003). If there were no applicable federal statute, the case would therefore turn on the interpretation of the first portion of the clause: specifically, the text's designation of "the Legislature." U.S. Const. art I, § 4. This Court has never interpreted the Elections Clause's designation of "the Legislature" in its literal, exclusive sense—and no party in this case asks for a literal construction. *See, e.g., Ohio* ex rel. *Davis v. Hildebrant*, 241 U.S. 565, 568-69 (1916) (rejecting the contention that "Legislature" precluded Ohio's use of popular referendum); *Smiley v. Holm*, 285 U.S. 355, 367-69 (1932) (rejecting the contention that "Legislature" precluded Minnesota's gubernatorial veto). Instead, this Court's decisions have validated reasonable State lawmaking choices. Given the diversity of State lawmaking institutions and procedures, any contrary interpretation would present several difficult and highly contested questions.

However, the Court need not and should not answer those questions in this case—because Congress has passed applicable legislation. Under the Elections Clause, once Congress has acted, the precise meaning and scope of "the Legislature" is no longer relevant.

For purposes of this case, Congress exercised its authority regarding redistricting in the statute now codified at 2 U.S.C. § 2a(c) ("Section 2a" or "§ 2a"). Pursuant to its power under the Elections Clause, *Branch*, 538 U.S. at 266, Congress in this statute

determined that the district lines for federal representatives are to be drawn by each State "in the manner provided by the law thereof." 2 U.S.C. § 2a(c).

That is, Congress took the authority that it was granted under the Elections Clause and used that power to remove any ambiguity concerning the legality of State redistricting procedures. Congress expressly allowed the States to draw federal district lines pursuant to the commands of State law, embracing the diversity of differing State approaches. Some States would draw lines using a legislative process; some would draw lines using a multibranch process with the legislature in a central role; some would draw lines using a process with legislative input but not primacy; and some would draw lines using a different process entirely. Congress exercised its regulatory power over federal elections to authorize each sovereign State to proceed as it wishes, pursuant to its own lawmaking procedures.

The Court can and should find that § 2a resolves this case, allowing Arizona to draw federal district lines pursuant to the structure outlined in the Arizona State Constitution. The statutory text is clear. The statute's design and legislative history show that the textual choices were intentional. The resulting outcome is not only lawful, but avoids the far more difficult implications of an unnecessary foray into contentious constitutional interpretation.

ARGUMENT

I. SECTION 2A ALLOWS EACH STATE TO DECIDE FOR ITSELF HOW CONGRESSIONAL LINES ARE DRAWN, FULFILLING THE CONSTITUTION'S FEDERALIST DESIGN

A. The Principle of Constitutional Avoidance Strongly Suggests That This Case Should Be Resolved on Statutory Grounds

The principal issue in this case concerns a State's authority to regulate its elections for federal representatives. Appellant claims that its own State Constitution is invalid to the extent that it authorizes the Arizona Independent Redistricting Commission to draw congressional district lines.

One path to resolving the instant dispute involves a straightforward interpretation of the text of a federal statute, 2 U.S.C. § 2a(c). Section 2a, which expressly authorizes States to draw congressional districts "in the manner provided by the law thereof," furthers the Constitution's broader federalist design and fosters a diversity of approaches reflecting each State's distinct political culture and public institutional heritage. The alternative path to resolving the instant dispute requires ignoring or invalidating that federal statute in order to reach a highly contested question of constitutional interpretation. That constitutional question—the meaning of "the Legislature" as used in the Elections Clause—is more difficult than it appears. Moreover, it would offer a resolution different from the federal statutory path only to the extent that it restricted State autonomy and deeply unsettled States' existing electoral infrastructure.

This Court generally resolves such disputes on statutory grounds without unnecessarily addressing contested constitutional questions. Just last Term, this Court reaffirmed that "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)). *See also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) ("Our usual practice is to avoid the unnecessary resolution of constitutional questions."). Such action, in the service of avoiding unnecessarily aggressive forays into contested constitutional territory, fosters important and long-treasured norms of judicial restraint. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. . . . The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.") (internal quotation marks and citations omitted).

As in *Bond*, statutory construction offers the more prudent resolution of the instant dispute. Whatever the meaning of the Elections Clause, it plainly divests "the Legislature" of the authority to regulate congressional elections to the extent that Congress chooses to regulate their "Times, Places and Manner."

Here, Congress has enacted a statute on point, thereby rendering unnecessary a construction of the first half of the Elections Clause. And a straightforward interpretation of the federal statute resolves the case—offering ample grounds to affirm the court below, albeit on a different basis than that reached by the district court. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("we have discretion to consider [arguments] . on any ground which the law and the record permit that would not expand the relief [the prevailing party below] has been granted."); *see also Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (noting, on direct appeal to this Court, that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.").[2]

The Court need not engage in a difficult examination of the scope of the Elections Clause's

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[2] Section 2a is explicitly referenced in the Court's order postponing a determination of jurisdiction and designating the merits questions to be addressed, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 46 (2014), and was invoked in proceedings below, *see* Defs.' Mot. Dismiss 9; Defs.' Resp. to Pl.'s Mot. Prelim. Inj., Consol., & Judicial Notice 13-14. *Cf. United States v. Locke*, 471 U.S. 84, 92 (1985) (construing appellate jurisdiction under 28 U.S.C. § 1252 to bring before the Court the "entire case," including "nonconstitutional questions actually decided by the lower court as well as nonconstitutional grounds presented to, but not passed on, by the lower court," and noting that "[t]hese principles are important aids in the prudential exercise of our appellate jurisdiction, for when a case arrives here by appeal under 28 U.S.C. § 1252, this Court will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided").

delegation of authority to the States' "Legislature[s]" because § 2a remains good law. Addressing the constitutional dispute is not only unnecessary, but would have wide-ranging consequences well beyond the case at hand. Consistent with this Court's prior approach, the instant dispute should be resolved on statutory grounds.[3]

B. The Clear Text of § 2a Allows States to Decide for Themselves How Congressional District Lines Are Drawn

Here, the relevant statutory text offers a plain and uncontroversial construction. Section 2a is the congressional scheme for determining the allocation and design of congressional districts. It sets forth the means to determine the number of federal representatives to which each State is entitled after each decennial Census, and the means to notify the executive of each State of the appropriate allotment. 2 U.S.C. § 2a(a)-(b). And, as relevant here, it sets a default geographic constituency for these federal representatives after each such reapportionment "[u]ntil a State is redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c).

That is, in § 2a, Congress has used its enumerated constitutional authority to regulate the manner by which federal representatives are chosen. In the

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[3] Under the statutory approach, the Court may have to address whether § 2a is a valid exercise of Congress's enumerated power to regulate federal elections. That question, however, has previously been answered by this Court, *see Hildebrant*, 241 U.S. at 568-69, and is neither as difficult nor as controversial as the question posed by the alternative path: the scope of the delegation of authority to the States' "Legislature[s]."

aftermath of each Census, once federal representatives are apportioned by formula, Congress provided that congressional district lines are to be redrawn by each State "in the manner provided by the law thereof." *Id.*

The requirement that each State redraw district lines "in the manner provided by the law thereof" incorporates whatever procedures State law establishes for the drawing of district lines. Many States have no codified process particular to federal redistricting; in these States, State law "provides" for the drawing of federal district lines just as it provides for the passage of other pieces of legislation. In other States, the State constitution specifies distinct rules for the drawing of lawful federal district lines. Some such State constitutional provisions specify distinct procedures;[4] others specify distinct institutions;[5] and still others specify particular criteria that district lines must meet.[6] In the event that congressional district

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[4] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(16); Cal. Const. art. XXI, § 2(h); Conn. Const. art. III, § 6(a), amend. art. XXX; Haw. Const. art. IV, § 2; Idaho Const. art. III, § 2(4); Mont. Const. art. V, § 14(3)-(4); N.C. Const. art. II, § 22(5)(d); N.J. Const. art. II, § II(4)-(5); N.Y. Const. art. III, § 4(b); Wash. Const. art. II, § 43(6)-(7); *see also* Cal. Gov't Code § 8253; Haw. Rev. Stat. § 25-2(b); Ind. Code § 3-3-2-2; Iowa Code §§ 42.3, 42.6; Me. Rev. Stat. tit. 21-A, § 1206; Tenn. Code § 2-16-102.

[5] *See, e.g.*, Ariz. Const. art. § IV, pt. 2, § 1(3)-(8); Cal. Const. art. XXI, § 2; Conn. Const. art. III, § 6, amend. art. XXVI(b); Haw. Const. art. IV, § 2; Idaho Const. art. III, § 2(2); Mont. Const. art. V, § 14(2); N.J. Const. art. II, § II(1)(a)-(c); N.Y. Const. art. III, § 5-b; Wash. Const. art. II, § 43(1)-(3); *see also* Cal. Gov't Code § 8252; Ind. Code § 3-3-2-2; Iowa Code §§ 42.5-42.6; Me. Rev. Stat. tit. 21-A, § 1206; Or. Rev. Stat. § 188.125.

[6] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(14)-(15); Cal. Const. art. XXI, § 2(d); Fla. Const. art. III, § 20; Iowa Const. art. III, § 37; Mo. Const. art. III, § 45; Mont. Const. art. V, § 14(1); N.Y.

lines violate State law, some States expressly permit State courts to draw district lines.[7] The federal statutory command in § 2a that each State must redraw district lines "in the manner provided by the law thereof" embraces each and all of these choices — including Arizona's choice to provide in its State constitution for a commission to conduct redistricting.

C. The Legislative History of § 2a Shows that Congress Intended to Allow States to Decide for Themselves How Congressional District Lines Would Be Drawn

Section 2a, which allows States to draw congressional district lines by whatever procedure and pursuant to whatever criteria State law permits,[8] was

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Const. art. III, § 4(c); Va. Const. art. II, § 6; Wash. Const. art. II, § 43(5); *see also* Haw. Rev. Stat. § 25-2(b); Iowa Code § 42.4; Me. Rev. Stat. tit. 21-A, § 1206; Mich. Comp. Laws § 3.63; Or. Rev. Stat. § 188.010.

[7] *See, e.g.*, Conn. Const. art. III, § 6(d), amend. art. XXVI(d); Haw. Const. art. IV, § 10; Iowa Const. art. III, § 36; *Hall v. Moreno*, 270 P.3d 961, 963 (Colo. 2012) (en banc); *In re 2003 Apportionment of State Senate & U.S. Congressional Dists.*, 827 A.2d 844, 845 (Me. 2003); *Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. 2012); *Guy v. Miller*, No. 11 OC 00042 1B, slip op. at 2-3 (Nev. 1st Jud. Dist. Ct. Carson City Oct. 27, 2011); *Egolf v. Duran*, No. D-101-CV-2011-02942, slip op. at 2-3, 9 (N.M. 1st Jud. Dist. Ct. Santa Fe Cnty. Dec. 29, 2011); *Alexander v. Taylor*, 51 P.3d 1204, 1207-10 (Okla. 2002); *Perrin v. Kitzhaber*, 83 P.3d 368, 370-71 (Or. Ct. App. 2004); *see also* Me. Rev. Stat. 21-A, § 1206; Mich. Comp. Laws §§ 3.73-3.74; N.C. Stat. § 120-2.4; Wash. Rev. Code Wash. § 44.05.100(d). This Court approved state judicial drawing of congressional districts in *Growe v. Emison*, 507 U.S. 25, 34, 37 (1993).

[8] There are two other federal statutory requirements relevant to congressional district lines. First, each representative must be elected from a single-member district. 2 U.S.C. § 2c. Second, the

the product of a very deliberate choice to validate a diverse array of State redistricting procedures. Congress's clear intent in this regard is demonstrated by both the statutory text and the legislative history.

First, the text of § 2a evinces a distinct congressional choice. Congress certainly knew of the Elections Clause and its reference to "the Legislature" of each State. If Congress wished § 2a to do no more than reflect the constitutional grant of authority, the most natural means to do so would have been to simply repeat the constitutional text verbatim. *Cf. Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality opinion) (construing statutory language mirroring constitutional text to "have an effect no different from" the constitutional text itself). Indeed, in decennial reapportionment statutes from 1862 through 1901, Congress provided rules that would govern the territory for the election of federal representatives after each apportionment "unless the legislature of said State should otherwise provide[.]" Act of July 14, 1862, ch. 170, 12 Stat. 572; *see also* Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28, 28 (similarly specifying the state legislature); Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 5, 6 (same); Act of Feb. 7, 1891, ch. 116, § 4, 26 Stat. 735, 736 (same); Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 733, 734 (same).

Then, in 1911, the statutory language changed. Previously, in the 1901 reapportionment statute, Congress set direction for the territories governing the election of federal representatives "until such State be

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Voting Rights Act prohibits abridging the right to vote on account of race, color, or language minority status. 52 U.S.C. § 10301.

redistricted . . by the legislature of said State[.]"[9] Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 733, 734 (emphasis added). Ten years later, Congress set direction for the territories governing the election of newly apportioned federal representatives "until such State shall be redistricted in the manner provided by the laws thereof[.]" Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 13, 14 (emphasis added).

This same language, allowing States to redistrict in the manner provided by State law, reappeared in all-but-identical form in 1941. *See* Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761, 762 ("Until a State is redistricted in the manner provided by the law thereof after any apportionment, ..."); *cf. Whitfield v. United States*, — S. Ct. —, No. 13-9026, 2015 WL 144680, slip op. at 2 (U.S. Jan. 13, 2015) (statutory text that remains unchanged "presumptively retains its original meaning"). The latter language has not since been amended. It is the language of § 2a today, which still provides that federal districts are to be drawn by the States "in the manner provided by the law thereof" and not "by the legislature thereof." The textual change reflects a

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[9] Specifically, Congress provided that if the number of representatives for a State increased, the new representatives would be elected at-large, and the pre-existing representatives would be elected in the pre-existing districts "until the legislature of such State shall redistrict such State"; if the number of representatives remained constant, they would be elected in the pre-existing districts "until such State be redistricted . by the legislature of said State"; and if the number of representatives declined, then all representatives would be elected at-large, "unless the legislatures of said States have provided or shall otherwise provide[.]" Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 733, 734.

distinct congressional choice that should be acknowledged as legally meaningful.

Second, the legislative history of § 2a confirms that the choice was intentional, and designed precisely to allow each State its choice of redistricting mechanism. There is little in the legislative record of the 1941 law to explain this portion of the text. But when the relevant language was first amended in 1911, changing the statute's focus from a State's "legislature" to its "law," there was rather robust debate regarding the change.

From 1862 until 1901, Congress had delegated federal redistricting authority explicitly to state legislatures. Mirroring the ambiguity of the designation in the Elections Clause, some members of Congress believed that this statutory language permitted involvement by actors and institutions other than the legislature itself, while others did not. *See, e.g.*, 47 Cong. Rec. 674-75, 3507-08 (1911).

Representative Crumpacker, Republican of Indiana, and Senator Burton, Republican of Ohio, led the effort to remove any ambiguity in the flexibility afforded to each State, by amending the language of the late nineteenth-century model. As Representative Crumpacker explained:

> Up to that time there had been no other method established by any State in the Union for the redistricting, except by the legislature thereof. Since then a number of reforms have been accomplished; a number of States in the Union have established the institution of initiative and referendum. Some States are so equipped with the lawmaking machinery that they can legislate; they can redistrict

> their territory for congressional purposes without the aid or assistance of the legislature. Voters may initiate propositions, and they may refer them to the people. This provision [specifying control by the State legislature], if it has any effect at all, will prevent those States from exercising that great function of redistricting their States for congressional purposes by the initiative and referendum altogether.

47 Cong. Rec. 673 (1911); *see also id.* at 3436 (statement of Senator Burton).

Further debate discussed the possibility, given the strength of national political parties unknown in the Founding Era, that a State legislature that was itself unfairly gerrymandered might similarly gerrymander congressional districts. This debate was deeply informed by the vicious redistricting battles of the late nineteenth century, including bitterly contested disputes over congressional lines. States had recently begun to experiment with different institutional mechanisms to control such political conflicts of interest. The members of Congress proposing the change in language thought it therefore desirable to allow States, if they chose, to create non-legislative means to draw congressional districts, or to create non-legislative means to approve or disapprove proposed districts. *Id.* at 673-74, 702-03, 3436, 3507.

The relevant floor debate focused primarily on the newly prominent mechanisms of statewide initiative and referendum, *see Hildebrant*, 241 U.S. at 568-69, but it also included discussion of redistricting by gubernatorial action or nonpartisan commission, and review of federal districts by the courts. 47 Cong. Rec. at 675, 701-03, 3436-37, 3507-09. The floor debate

makes clear that the 62d Congress understood the Elections Clause to give it power to delegate the responsibility for drawing federal districts to the institution of its choice—and, likewise, to give it power to allow State law to determine the appropriate institution instead, encompassing each of the options above. *Id.* at 3509 (statement of Senator Burton).

Representative Crumpacker explained his proposed change from a specific delegation to the State "legislature" to any institution or process authorized by State "law" by stating that "the effect of this amendment, if it goes through, will leave to the several States the power of choosing the manner in which the redistricting shall be made." *Id.* at 701.

Similarly, Senator Burton pressed for change by asking "[w]hat right" the Senate had "to fix one inflexible way and require that every State shall be divided into congressional districts in that manner" despite States' "different methods and laws pertaining to the enactment of legislation." *Id.* at 3507. Though "[i]t was very natural in 1890, and even in 1900, that a provision should be incorporated that the State should be redistricted 'by the legislature thereof" when "that was the only law-making power," Senator Burton recognized that States had since devised "a new method of making laws," and that Congress could "not afford to cling either to obsolete phraseology, or obsolete methods—that is, to ignore their methods of enacting laws." *Id.* at 3508. Senator Burton pressed for his amendment because "[a] due respect to the rights, to the established methods, and to the laws of the respective States requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes," rather than commanding, contrary to State

law, that they "act by the legislature alone." *Id.* at 3436. And he concluded:

> So I have suggested that the Senate strike out the words "by the legislature thereof in the manner herein prescribed," and insert in lieu thereof, first, the words "in the manner provided by the laws thereof." This gives to each State full authority to employ in the creation of congressional districts its own laws and regulations. What objection can be made to a provision of that kind? Pass this amendment, and you will transmit to each State the message "Proceed and district your State in accordance with your laws." This act [prior to amendment] does not do that. It sends the message, "Do it in only one specified way; that is, by your legislature."

Id. at 3437.

Representative Crumpacker's amendment was originally rejected in the House, *id.* at 704, but Senator Burton's parallel amendment was approved. *Id.* at 3555-56. The bill, as amended, passed the Senate, *id.* at 3558, and the amendments were then approved by the House. *Id.* at 3604.

The legislative history demonstrates that the 1911 change in language—enacting the same operative language that now appears in § 2a—was deliberate, that it was carefully considered by the Congress, and that it was designed to do exactly what it appears to do: to authorize States like Arizona to draw federal district lines by any means authorized by State law.

D. Section 2a Is a Valid Statute that Fulfills the Federalist Constitutional Design

The text and history described above demonstrate that when Congress deliberately chose to exercise its authority under the Elections Clause, it did so by ceding primary redistricting responsibility back to the States, allowing each State to use whatever means are provided by that State's law. Indeed, the statute is sufficiently clear that Appellant presents no alternative construction of § 2a. Instead, Appellant suggests that this text and history should be ignored or that the statute should itself be deemed unconstitutional. This aggressive response is unwarranted: Section 2a is entirely in keeping with the constitutional design.

The Elections Clause has always been an instrument of federalism. As a default, it allows each State to develop its own regulations for electing federal representatives, recognizing that the laboratories of democracy may well foster worthwhile innovation, and that the diversity of State regimes may yield a stronger federal legislature overall. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting). But it recognizes as well the danger in plenary State control over national elections, particularly in a climate of hostility to the national government. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995); The Federalist No. 59 (Alexander Hamilton). And so it allows Congress "comprehensive" power over the manner in which federal legislative elections are conducted, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253-54, 2256-57 (2013), exempting only the places of choosing Senators (which, given the

legislative selection of Senators prescribed by Art. I, § 3, were effectively the State capitol buildings).

In § 2a, Congress has used this enumerated power to prescribe regulations for electing federal representatives. No matter what interpretation is given to the first half of the Elections Clause—whether the designation of "the Legislature" is literal and exclusive, or whether (consistent with this Court's precedent) it is not—once Congress intervened to set redistricting rules, "the Legislature[s]" were constitutionally divested of the power to set the rules. Congress's exercise of its enumerated authority overrides any designation in the first part of the Elections Clause and renders a conflict over the meaning of that designation irrelevant.

Once in plenary possession of regulatory authority over redistricting, Congress chose to cede primary authority back to each State, to redistrict in any manner provided by State law, whether "through [the] legislature or [some] other body." *Branch*, 538 U.S. at 261 (internal quotations and citations omitted). That is, Congress exercised its power under the Elections Clause to preserve precisely the federalist balance animating the Elections Clause. The natural reading of § 2a is entirely consistent with the "basic principles of federalism embodied in the Constitution" that properly informs this Court's statutory interpretation. *Bond*, 134 S. Ct. at 2090.

Moreover, nothing in the Elections Clause suggests that Congress is constrained in any way in its authority to "make or alter" whatever rules it chooses for the manner of electing federal representatives, so long as it does not alter the places of choosing Senators. No text within the Elections Clause limits either the substance or process of redistricting

regulation: once Congress has properly exercised its authority, the control granted by the Elections Clause itself is plenary. Restrictions on Congress's exercise of this authority arise only from different constitutional provisions imposing separate constraints.[10] None with any relevance has been suggested here.

The explanation above follows this Court's approach in *Ohio* ex rel. *Davis v. Hildebrant*. Faced with a challenge to the constitutionality of the 1911 precursor to § 2a, this Court quickly dismissed the notion that the Elections Clause could limit Congress's authority to regulate the procedures for federal elections. Instead, attempting to make sense of plaintiffs' search for a plausible collateral limit on that authority, this Court turned briefly to the Guaranty Clause. The reason that this Court believed the challengers to be asserting a Guaranty Clause claim is that the Court recognized that within the Elections Clause itself, there is no limit to Congress's enumerated power to regulate the manner of federal elections. *See Hildebrant*, 241 U.S. at 569.

As for Congress's choice to exercise its plenary authority by authorizing each State to conduct redistricting as it wishes, this Court has deferred to Congress in its choice of institutional delegees under the Elections Clause. In *Buckley v. Valeo*, for example, this Court faced a challenge to the newly formed Federal Election Commission. The FEC was given recordkeeping, disclosure, investigative, and enforcement responsibilities, but it was also delegated substantive policymaking authority, including the ability to exceed direct statutory spending limits and

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[10] For example, Congress may not exercise this power in a manner violating the Fifteenth Amendment.

the unique ability to issue policy-based advisory opinions that effectively grant the recipient immunity for statutory violations. 424 U.S. 1, 110-11 (1976). The Court invalidated Congress's attempt to directly appoint members of the FEC to the extent that such members were charged with performing the tasks of "Officers of the United States," but did not otherwise question Congress's power to delegate its regulatory function under the Elections Clause to a body like the FEC. *Id.* at 131-32, 137-38.

Here, Congress has chosen to exercise its power under the Elections Clause by authorizing any institutions empowered by State law to conduct congressional redistricting. The choice may be unconventional, but it preserves rather than undermines the original federalist balance of the Elections Clause. There are neither textual nor atextual constitutional grounds for restricting that choice.

Indeed, Appellant makes only a weak and unsupported assertion that § 2a is itself unconstitutional. Br. for Appellant 56. In doing so, it fails to address that this Court has previously rejected precisely that argument. *See Hildebrant*, 241 U.S. at 569 ("In so far as the proposition challenges the power of Congress . . . the argument but asserts . . . that Congress had no power to do that which, from the point of view of § 4 of article 1, . . . the Constitution expressly gave the right to do.").

Instead, Appellant essentially asks this Court to ignore the statute, contending that it has been impliedly repealed or that it has lapsed into desuetude. Br. for Appellant 14 (characterizing the statute as "largely obsolete"); *id.* at 56 (characterizing

the statute as "obscure" and "narrowed . . to the brink of irrelevance").

This Court should reject the invitation to ignore federal law. Implicit repeals of federal statutes are strongly disfavored, and, indeed, the Court has rejected the notion that portions of this very statute have been implicitly repealed. *See Branch*, 538 U.S. at 273 (plurality opinion). Nor is it at all clear that time has passed the statute by. Pursuant to 2 U.S.C. § 2a(a), the President transmitted his most recent report on the apportionment population to the Congress on January 5, 2011. *See* Statement of Apportionment Population, H.R. Doc. No. 112-5 (2011). Not two weeks later, the Clerk of the House of Representatives transmitted her most recent certificates of entitlement, designating the number of representatives for each State, pursuant to 2 U.S.C. § 2a(b). Office of the Clerk, H.R, Certificate of Entitlement, *available at* http://leg.mt.gov/content/Committees/Interim/2011-2012/Districting/Other-Documents/reapportionment-certificate.pdf (last visited Jan. 20, 2015). And 2 U.S.C. § 2a(c)(1)-(5) set forth provisions for redrawing district lines if States do not exercise that responsibility; perhaps precisely because these default provisions exist, States (or federal courts) have in fact redrawn the lines, and the provisions themselves have not determined the geographic territory for congressional elections. Still, the provisions remain valid in certain circumstances, and though it is unlikely that they would be deployed, they could nevertheless be binding following any future census.[11]

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[11] As Appellant apparently recognizes, paragraph 2a(c)(5)—which directs the at-large election of representatives when a State has a greater number of districts (from a prior redistricting)

Yet even if the remainder of § 2a had fallen into disuse or were otherwise superseded, the most important provision for these purposes is still very much in active service: the clause at issue in this very case, performing the very function that its proponents intended by giving States the authority to draw federal lines by any means provided in State law. No other federal statute conflicts with § 2a's provision that a State may draw federal district lines "in the manner provided by the laws thereof." And this provision continues to play a vital role. In virtually every State, some entity other than the State legislature plays some role in redistricting; each of these States has been able to rely on § 2a to confirm that its choice of redistricting authority is lawful despite any ambiguity in the Elections Clause. Arizona relied on § 2a in the redistricting at issue in this very case, when it redrew district lines as

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than the number of districts that State is allotted—would always be consistent with constitutional equal population requirements. *Cf.* Br. for Appellant at 54 (claiming that "four-fifths of the default options . . have been rendered unconstitutional"). Contrary to Appellant's claim, the other four specifically articulated conditional provisions in § 2a(c)(1)-(4) would be entirely consistent with constitutional equal population requirements if decennial population increase or decrease were relatively even across a State. *See Branch*, 538 U.S. at 273 (plurality opinion) (noting that such a scenario is possible, but unlikely). And in any event, these provisions might represent lawful temporary measures if it were unfeasible to draw constitutionally permissible districts—or single-member districts required by 2 U.S.C. § 2c—before upcoming elections. *Id.* at 275 (plurality opinion); *cf. Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (recognizing, in the context of state legislative districts, that "under certain circumstances . . equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid").

provided by its State Constitution. This portion of the statute has not withered from lack of application.

Appellant claims that *Branch v. Smith* has reduced § 2a to an effective nullity, Br. for Appellant 55, but no part of *Branch* addressed this most relevant text. And this Court has described as "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Section 2a should be reaffirmed as a valid exercise of congressional power, allowing Arizona's Constitution to designate the means by which Arizona's State institutions draw Arizona's congressional districts.

II. THE STRAIGHTFORWARD CONSTRUCTION OF THE VALID STATUTE AVOIDS DIFFICULT CONSTITUTIONAL QUESTIONS

A. No Party Seeks a Literal Construction of the Constitutional Text

If Congress had not enacted § 2a, the authority to draw Arizona's federal district lines would have been governed by the first half of the Elections Clause: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]" Unlike the plain text of § 2a, this text's apparent simplicity masks a host of exceedingly difficult choices.

Indeed, no party to this case urges a strictly textual reading of the Elections Clause. Appellees urge that this clause be interpreted, consistent with this Court's

precedent, to give power to the State to regulate federal elections by the mechanisms and institutions in which State law vests the State's lawmaking power. *See* Br. for Appellees 33, 35-38. Appellant urges that this clause be interpreted to give power to the State to regulate federal elections in a manner reflecting the "ordinary" legislative process and preserving a primary role for the State legislature, but also accommodating atextual roles for the governor or courts. *See* Br. for Appellant 44, 47, 51, 53. But neither party insists on a strictly textual reading, wherein the only State institution with the power to regulate federal elections is the State legislature itself.

Such strict textual readings are not unheard of when legislatures are asked to take on authority of a non-regulatory character. The designation of the State "Legislatures" in Article V as the body responsible for ratification of constitutional amendments in the absence of State conventions, for example, has been understood to be (as the text suggests) an exclusive grant, with no role for the State executive or any other actor. *See Hawke v. Smith*, 253 U.S. 221, 227-28 (1920). The same is true of the designation of the State "Legislature" in Article I, § 3, as the body responsible for electing United States Senators. *See* 2 J. Story, *Commentaries on the Constitution of the United States* § 703 (1833). This approach, however, does not reflect the Court's consistent interpretation with respect to the regulatory function of the Elections Clause. *See, e.g., Hildebrant*, 241 U.S. at 568-69 (rejecting the contention that a popular referendum violates the Elections Clause); *Smiley*, 285 U.S. at 367-69 (rejecting the contention that a gubernatorial veto violates the Elections

Clause).[12] Moreover, neither party has proposed such a resolution here.

B. Reaching Beyond the Clear Statute to Interpret the Constitutional Text Presents Many Difficult Constitutional Questions

In arguing for non-literal interpretations of the Elections Clause, both parties implicitly concede that construing its text involves a host of contested and exceedingly thorny questions. Moreover, the different nonliteral interpretations of the constitutional text represent deeply contested and often troubling interference with sovereign State lawmaking processes. Section 2a gives States plenary authority to select the institutions of their choice in drawing district lines; any constitutional construction yielding a result different from the result of the straightforward

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[12] *Cf. Koenig v. Flynn*, 179 N.E. 705, 707 (N.Y. 1932) ("When this government began to function under the Constitution adopted in 1787–1789, the then existing states apparently understood section 4, article 1, of the Federal Constitution to refer to the lawmaking power of the Legislature or to such bodies as the individual states had created for the enactment of laws. The uninterrupted practice in all of the states has been to create congressional districts by laws enacted in accordance with the Constitution of the respective states, whatever that may be. While the plain and direct provisions of a Constitution cannot be modified or amended by practice, custom, or violation, no matter how long continued, such uniformity by all the states in the method of electing Congressmen indicates quite clearly the meaning which was given to section 4 of article 1, especially in the early days when the people were so sensitive to intrusion and control by individual executives. A uniform course of action involving the right to the exercise of an important power by the state government without question is no unsatisfactory evidence that the power is rightfully exercised.").

statutory reading only restricts a State's sovereign autonomy.

This Court has already determined that the Elections Clause does not preclude a State's use of popular referendum or gubernatorial veto in regulating federal elections. *Hildebrant*, 241 U.S. at 568-69; *Smiley*, 285 U.S. at 367-69. Even without disturbing these holdings, a host of contested issues would inevitably flood the courts with litigation if § 2a were ignored or invalidated, including the following questions:

- Is the federal constitutional designation of "the Legislature"—whatever the content of that term—intended to be a protection for a State that the State may validly waive by selecting alternative actors or institutions pursuant to its own constitutional processes?
- Does the federal constitutional designation preclude or accommodate the traditional understanding that State lawmaking institutions are normally authorized to act only pursuant to the procedural limitations in their own States' constitutions?
- Does the federal constitutional designation preclude or accommodate a State legislature's decision to delegate, limit, or shape its own authority when the State legislature itself initiates constitutional change to the procedure or criteria for drawing lines, as in at least eight States, or for otherwise regulating federal elections?
- Does the federal constitutional designation preclude or accommodate a State's use of a commission in which the legislative leadership

selects most commissioners from a nominations pool, as in Arizona, Ariz. Const. art. IV, pt. 2, § 1(3)-(8); or a commission in which the legislative leadership strikes commissioners from a nominations pool, as in California, Cal. Gov't Code § 8252?

- Does the federal constitutional designation preclude or accommodate a State constitution's designation of a commission in which the legislative leadership directly selects commissioners based on certain criteria, as in Idaho, Idaho Const. art. III, § 2(2); or Washington, Wash. Const. art. II, § 43(2)-(3); or—if apportioned more than one district—Montana, Mont. Const. art. V, § 14(2)?
- Does the federal constitutional designation preclude or accommodate a State constitution's designation of a commission in which the legislative leadership selects most commissioners, who may themselves be legislators, as in Hawaii, Haw. Const. art. IV, § 2; or New Jersey, N.J. Const. art. II, § II(1)(a)-(c)?
- Does the federal constitutional designation preclude or accommodate a State's use of an advisory entity, which must make recommendations before the legislature is legally empowered to act, and the recommendations of which must be rejected multiple times by the legislature before the legislature is empowered to make the ultimate decision regarding district lines, as in Iowa, Iowa Code §§ 42.3, 42.5, 42.6; or New York, N.Y. Const. art. III, § 4(b)?
- Does the federal constitutional designation preclude or accommodate a State constitution's

use of a backup commission to draw the lines if the legislature fails to do so by a certain time, as in Connecticut, Conn. Const. art. III, § 6(b); or Indiana, Ind. Code § 3-3-2-2?

- Does the federal constitutional designation preclude or accommodate a State's establishment of legislative supermajority requirements distinct from the majority needed to pass "ordinary" legislation, as in Connecticut, Conn. Const. art. III, § 6(a); or Maine, Me. Rev. Stat. tit. 21-A, § 1206?
- Does the federal constitutional designation preclude or accommodate State constitutional or statutory provisions allowing the State judiciary to draw federal district lines, as in at least fourteen different States?
- Does the federal constitutional designation preclude or accommodate State constitutional provisions allowing State judicial review of federal district lines and other federal election regulation, as in every State?
- Does the federal constitutional designation preclude or accommodate a State's legal provisions that provide that federal district lines are valid under State law only when recorded by the Secretary of State, as in California, Cal. Const. art. XXI, § 2(i)-(j)?
- Does the federal constitutional designation preclude or accommodate a State's delegation of regulatory authority over federal elections to statewide or local administrative authorities, as in every State?
- Does the federal constitutional designation preclude or accommodate State constitutional

> provisions constraining the substantive choices of a State legislature, including rules (entirely absent from binding federal law) requiring congressional districts to be contiguous or compact, as in Florida, Fla. Const. art. III, § 20(a), and at least eight other States? And if such State constitutional provisions are not precluded, does it matter whether the provisions were enacted by a citizens' initiative or by a measure initiated by the legislature but now serving to constrain legislative discretion? *See, e.g.*, Legislative Parties' Answer Br. & Initial Br. on Cross Appeal at 148-49, *League of Women Voters of Fla., Inc. v. Detzner*, No. SC14-1905 (Fla. Dec. 19, 2014) (claiming that the Elections Clause releases a State legislature from the obligation to follow redistricting criteria placed in a State's constitution by the initiative process).

If the Court chooses to ignore or invalidate § 2a in order to construe the Elections Clause, these questions would inevitably arise not only in the context of redistricting, but with respect to all State regulation of the federal election process, including many long-established and uncontroversial rules of nuts-and-bolts election administration. The result would be deeply unsettling to traditional understandings of the regulatory regime governing the election process. Indeed, a constitutional ruling on terms other than Appellees' favored construction might well lead to a bifurcated—and far more chaotic—election structure, with the rules for congressional elections within a State different from the rules for State elections in that State. It is far more prudent, and more consistent with this Court's precedent, to instead resolve this case on statutory grounds.

CONCLUSION

For the foregoing reasons, the judgment of the three judge court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 13-1314

In the Supreme Court of the United States

ARIZONA STATE LEGISLATURE, APPELLANT,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF STATE AND LOCAL ELECTED OFFICIALS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF STATE AND LOCAL ELECTED OFFICIALS AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE

Amici are a bipartisan group of current and former governors, attorneys general, justices, and other senior elected officials from state and local governments.[1] Amici have served in the governments of multiple States, including Arizona, Maryland, Montana, New Mexico, New York, Pennsylvania, Rhode Island, and Washington State. Over the course of their careers as public servants, amici have become familiar with the different roles played by state legislators, governors, courts, and independent commissions and, of most importance, citizens, in States' federal redistricting processes.

As amici have seen firsthand, so-called "*gerrymandering*" is a serious problem.[2] It has resulted in

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's Office.

[2] Gerrymandering is the practice of drawing district boundaries to increase the likelihood of particular electoral outcomes. See Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 Wm. & Mary L. Rev. 1, 4 (2008). The term is a portmanteau of the last name of Elbridge Gerry, the eighth Governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander.

deeply polarized and gridlocked legislative bodies, uncompetitive elections, and heavy burdens on the judicial system, and has deprived citizens of the right to make meaningful choices. The Framers, however, provided a political solution to this political problem: federalism. When the voters of a state believe, as amici do, that gerrymandering and its effects threaten the public's right to a truly representative democracy, they may experiment with alternative methods for the drawing of legislative districts. Because amici are deeply committed to meaningful representative democracy as the foundation of this Nation's political system and fundamental values, they file this brief. Amici do not believe that the Framers adopted the Elections Clause of the Constitution to curtail the basic right of citizens to govern—a right that imbues the entirety of the Constitution and our political process.

SUMMARY OF ARGUMENT

The citizens of the State of Arizona have used their legislative powers to implement a potential solution to a serious problem: the state legislature's gerrymandering of federal election districts. As amici well know, throughout our Nation's history, States have developed many novel voter initiatives and referenda to enhance our democratic system by changing how Members of Congress are elected, including giving women the right to vote, developing the primary system, combating voter fraud, and expanding access to minority political parties. Initiatives can implement election reforms that have broad public support, but that legislatures may not want to pass.

The particular problem that Arizona's voters seek to remedy, gerrymandering, is one that many States

have tried to address. Many amici have proposed or supported anti-gerrymandering efforts, in their roles as governors, mayors, attorneys general or justices, and States have addressed gerrymandering in different ways. Some, like Arizona, use independent commissions to redistrict; others use commissions as a "backup" to redistrict if legislatures are unable to approve a plan. See National Conference of State Legislatures (NCSL) Br. 5-17. This variety of approaches—which appellant seeks to shut down—is consistent with our system of federalism in which States serve as laboratories of democracy.

States' power to regulate federal elections comes from the Elections Clause of the Constitution, which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4. The Court consistently has interpreted the term "Legislature," as used in this clause, to refer to a State's entire lawmaking function, rather than to any specific government body. See *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569 (1916); *Smiley* v. *Holm*, 285 U.S. 355, 364, 372-73 (1932); *Growe* v. *Emison*, 507 U.S. 25, 34 (1993). This interpretation is based upon the time-honored principle that there is no "one size fits all" requirement for state lawmaking; each State determines its own legislative process under our federal system. See *Alden* v. *Maine*, 527 U.S. 706, 752 (1999); *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991); *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937). This interpretation also reinforces the Election Clause's purpose of allowing States to manage federal elections in order to ensure that citi-

zens can make meaningful decisions in the exercise of their franchise. A crabbed reading of the Election Clause that would limit States' authority to manage federal elections, by limiting voters' ability to establish election mechanisms, would undermine this principle and purpose.

Appellant nevertheless urges the Court to reverse its longstanding interpretation, and instead read the Elections Clause as granting the power to regulate federal elections to state legislatures "alone." Appellant Br. 39. This reading cannot be squared with basic principles of federalism, or with the history and purpose of the Elections Clause. If adopted, appellant's rule would impede the development of state-tailored solutions to gerrymandering, hinder any innovative federal election regulation that does not begin and end with State legislatures, and thwart the right of voters to participate meaningfully in the political process.

ARGUMENT

ARIZONA'S USE OF ITS LEGISLATIVE POWERS IS CONSISTENT WITH BASIC PRINCIPLES OF FEDERALISM

When the voters of the State of Arizona amended their State Constitution to create the Independent Redistricting Commission, they did so to address an entrenched and debilitating political problem that amici understand all too well: the gerrymandering of congressional districts. The actions of Arizona's voters are consistent with the federalist structure of our government and the purpose of the Elections Clause. The Elections Clause should be read to vest responsibility for managing federal elections in States without limiting the methodology for accomplishing this objec-

tive. To adopt an alternative interpretation—that singles out federal elections as the one area where States cannot order their own legislative powers—would frustrate the efforts of States, citizens, and the amici to solve elections-related problems, including gerrymandering.

A. The Elections Clause Empowers Each State To Establish Its Own Processes For Holding Congressional Elections

1. States are laboratories of democratic policies and legislative processes

The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009); see *Gregory*, 501 U.S. at 458; *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Deference to state lawmaking "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory*, 501 U.S. at 458).

States are not only laboratories of policies, but also of legislative structures. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy*, 300 U.S. at 612. The

people structured and restructured their States' lawmaking apparatuses during the Framers' lifetimes. During the founding decade, "the thirteen independent states debated, framed, adopted, rejected, modified, and continued to debate at least twenty state constitutions," Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541, 543 (1989), which structured state legislative schemes in different ways. States "became the laboratories for . . trying the institutions in the various forms that presently appeared in the constitutions of the United States and other countries." Jackson Tyler Main, *The American States in the Revolutionary Era*, in R. Hoffman & P. Albert, *Sovereign States in an Age of Uncertainty* 1, 23 (1981). Against this backdrop, it would be unwarranted to conclude that the Constitution was intended to vest any particular state structure with the exclusive authority to regulate elections.

Today, state legislatures still structure and manage their lawmaking in different ways. But all States reserve some form of legislative power for their voters.[3] Initiatives and referenda enhance States' ability to act as laboratories of democracy by allowing citizens to address problems that legislators might not

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[3] Twenty-four states have an initiative process, fifty states have legislative referenda (i.e., a process where the legislature submits a question via the ballot), and twenty-four states have popular referenda. See National Conference of State Legislatures, *Initiative, Referendum and Recall*, http://www.ncsl.org/ research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx (last visited Jan. 22, 2015).

act on. As James Madison put it, "the genius of Republican liberty [demands] not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people " Federalist No. 37 (Madison).

Appellant may well agree with the proposition that States generally should determine their own legislative structure and act as laboratories for policies and ideas. See, *e.g.*, Appellant Jurisdictional Stmt. 21-22. In contravention of those principles, however, appellant argues that the Framers intended to prevent States from using their disparate legislative processes to enact laws for federal elections. Instead, appellant theorizes, the Framers drafted the Elections Clause specifically to require States to use their legislatures "alone" to prescribe federal election regulations. Appellant Br. 39. Thus, the States would be barred from using citizen initiatives—that otherwise would be a normal part of their lawmaking function—in the management of federal elections alone. This reading of the Elections Clause is inconsistent with the longstanding endorsement of States' legislative self-determination[4] and the purpose of the Elections Clause.

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[4] See, *e.g.*, *Ice*, 555 U.S. at 171. It also is inconsistent with the Framers' view of state experimentation, see, *e.g.*, Federalist No. 61 (Hamilton) ("entrust[ing]" elections matters "to legislative discretion" of the States is preferable to fixing them in the Constitution because States "might, upon experiment," alter their processes).

2. The Elections Clause purposefully vests States with the authority to regulate federal elections

The Elections Clause accomplishes a straightforward objective: it vests States with authority for regulating "[t]he Times, Places and Manner" of congressional elections. U.S. Const. art. I, § 4. One of the reasons that the Framers gave this authority to the States was to alleviate fears that, if the power were left to the federal government alone, incumbent members of Congress could manipulate election laws to secure their reelections. See, *e.g.*, Cornelius (Dec. 18, 1787) in 4 *The Complete Anti-Federalist* 10.10 (Herbert J. Storing, ed., 1981) (*Anti-Federalist*). ("Should . . . the major part of the Members of Congress . be elected in, and near the seaport towns; there would, in that case, naturally arise strong inducements for fixing the places for holding elections in such towns, or within their vicinity."); Letters from The Federal Farmer, no. 3 (Oct. 10, 1787) in 2 *Anti-Federalist* 8.25 ("The branches of the legislature . ought to be so fixed *by the people*, that the legislature cannot alter itself by modifying the elections of its own members.") (emphasis added).

Had the Framers truly intended to dictate how States' citizens must exercise their lawmaking powers in the area of federal elections, one would think this departure from federalist principles would have been much-debated. But the Framers' debates do not reflect significant concern with how States would exercise their power to regulate federal elections, or prescribe any specific state body that would exercise this power. See *Brown* v. *Sec'y of State of Fla.*, 668 F.3d 1271, 1275 (11th Cir. 2012) ("Debate about the Elections Clause prior to the ratification of the U.S. Con-

stitution focused almost exclusively on the Clause's second part, which allows Congress to supervise or alter the states' exercise of their Elections Clause power."). In fact, the Framers referred to "the States" and the "State Legislatures" interchangeably in their discussions of the Elections Clause.[5] The use of the term "Legislature" in the Elections Clause thus should not be read to restrict the right of States' citizens to exercise lawmaking authority over congres-

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[5] Compare 2 *The Records of the Federal Convention of 1787* 239 (Max Farrand ed., rev. ed. 1937) (*Records*) (statement of Pinkney & Rutlidge) (in discussing the need for residual federal authority over elections, stating, "The States they contended could & must be relied on in such cases."); Letters from The Federal Farmer, no. 12 (Jan. 12, 1788) in 2 *Anti-Federalist* 8.161-65 ("[T]he states shall make regulations [regarding elections], and congress may make such regulations as the clause stands[.]"); *Debate in Virginia Ratifying Convention, June 14, 1788*, in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 366-67 (Jonathan Elliot ed., 2d ed. 1888) (statement of James Madison) ("And, considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be submitted to the former, and the general regulations to the latter."); Charles Upham, 2 *The Life of Timothy Pickering* 356-57 (1873) (letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787)) ("If we give a loose to our imaginations, we may suppose that the State governments *may* abuse their power, and regulate these elections in such manner as would be highly inconvenient to the people, and injurious to the common interests of the States.") (emphasis in original); *Letters from The Federal Farmer, no. 3* in 2 *Anti-Federalist* 8.25 ("Were it omitted, the regulations of elections would be solely in the respective states[.]") with 2 *Records* 239 (statement of James Madison) ("This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections.").

sional elections. The Framers did not intend to dictate how federal elections must be run or to prevent the voters of each State from organizing their legislative affairs as they see fit. The concern was, rather, that federal election power be vested in the body that "com[es] far nearest to the people themselves[.]" Letters from the Federal Farmer, no. 12 (Jan. 12, 1788) in 2 *Anti-Federalist*.

3. Appellant's proposed reading is at odds with the Court's cases, principles of federalism, and States' established practices

This Court has not read the Elections Clause as specifically or exclusively delegating federal redistricting responsibility to a specific state body. Rather, the Court has interpreted the Elections Clause broadly, to permit each State to regulate federal elections through its own legislative process. In *Hildebrant*, the Court permitted a voter referendum to veto a state legislature's redistricting plan. See 241 U.S. at 569. In *Smiley*, the Court affirmed the governor's power to veto legislative redistricting plans. See 285 U.S. at 364, 372-73. And in *Growe*, the Court recognized that state courts had the power to prescribe redistricting plans, reiterating the principle that States can use "[their] legislature or other body," in federal redistricting. 507 U.S. at 34.[6]

Despite these cases, appellant urges this Court to rule, for the first time, that the Elections Clause requires States to use their legislatures "alone" to prescribe federal election regulations. Appellant Br. 39.

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[6] If appellant's proposed rule were adopted, *Hildebrant*, *Smiley*, and *Growe* all would need to be seriously re-examined, and either limited or reversed.

This is inconsistent with the Court's repeated holding to the contrary, that "a State is entitled to order the processes of its own governance." *Alden*, 527 U.S. at 752; see also *Bond*, 131 S. Ct. at 2364; *Gregory*, 501 U.S. at 460. Most States constrain the abilities of their legislatures to prescribe redistricting plans in some manner, be it by gubernatorial veto, voter referendum, or judicial review of legislative deadlocks. A rule that state legislatures "alone" must prescribe federal election regulations cannot be squared with States' current practices or their rights to structure their own governments.

Appellant neither acknowledges nor addresses the many ways in which a requirement that legislatures "alone" prescribe federal election regulations is ill-defined and illogical. On the one hand, one might interpret appellant's rule as allowing state legislatures to delegate their authority to commissions. But then the principle appellant proposes is merely formalistic; Arizona's legislature can do what its voters cannot, and this lawsuit merely is a political power play dressed up as a federal constitutional challenge, brought by legislators who seek to disempower their own citizens. On the other hand, if legislatures' authority cannot be transferred, it is unclear why state legislatures are restricted in a single area—voting regulations—in a way that Congress itself—which can delegate authority over many issues to committees, agencies or other authorities, see *Touby* v. *United States*, 500 U.S. 160, 165-66 (1991)—is not. Appellant offers no convincing rationale to justify why the Constitution would treat state legislatures so differently in this area, and there is no satisfactory argument that the Framers intended such a consequence.

Appellant also ignores that its proposed rule could require intrusive judicial intervention into state election laws. Appellant maintains that the Constitution requires that state legislatures alone have the power to "prescribe" federal election regulations. Appellant Br. 39. But States currently arrange their redistricting in different ways, which, in turn, intrude on legislative powers differently. See Sec. B(3). It is not clear which of these intrusions would cross the line into "prescribing" voting regulations under appellant's reading.[7] Appellant's proposed rule thus would require courts to conduct a searching review of legislative processes to determine when a given measure impermissibly usurps a legislature's power. In doing so, courts will be forced to break with the traditional judicial deference accorded to each State's lawmaking function and to substitute their own judgments for the judgments of a State's citizens about the appropriate role of state legislators.

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[7] For example, of the seven States that use independent commissions, appellant's amicus NCSL argues that five are constitutional under appellant's rule, because legislators may appoint "whomever they want" as commissioners. NCSL Br. 17. This is in contrast to Arizona's scheme, where legislators still select commissioners, but from a pre-determined list of candidates. Ariz. Const. art. IV, pt. 2, § 1(3)-(8). But there is no obvious way in which a list is necessarily more "outcome determinative" of specific congressional boundaries, as appellant's rule requires. And even under the five schemes NCSL deems constitutional, candidate choices can be restricted in other ways, by, for example, "excluding past or current elected officials for a period of time." NCSL Br. 17 n.83. Appellant articulates no clear rule for why these restrictions allow legislators an outcome determinative role, but Arizona's restrictions do not.

B. Arizona Voters Have Exercised Their Authority Under The Elections Clause To Address What Could Otherwise Be the Intractable Problem Of Gerrymandering

Although gerrymandering is only one of many electoral issues that States have sought to address using voter initiatives and referenda, it is a serious problem that threatens the integrity of the democratic process. Appellant's proposed reading of the Elections Clause would imperil States' efforts to confront that problem. It also would threaten a host of other important electoral reforms in a variety of States that voters have enacted through initiatives to respond to state-specific concerns. In many of amici's States, voters have used their franchise to propose or enact regulations that change voting in various ways. The Election Clause's grant of authority to States should not be read in a manner that thwarts the will of States' own citizens as expressed through the democratic process.

1. States historically have used initiatives and referenda to address a variety of concerns

States have used voter initiatives to pioneer some of the most important voting improvements and reforms in American democracy. Arizona's first voter initiative granted women the right to vote after state delegates failed to adopt a constitutional amendment to the same effect. See Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 Vand. L. Rev. 657, 663-64 (1996). Voter initiatives also established some of the first primary elections, see Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct*

Legislation in Election Law Reform, 78 S. Cal. L. Rev. 997, 1024-25 (2005), in an attempt to destroy "'the corrupt alliance' between wealthy special interests and the political machine," *Lightfoot* v. *Eu*, 964 F.2d 865, 872 (9th Cir. 1992) (internal citation omitted).

More recently, voters have used the initiative process to change how primaries are conducted, sometimes against the wishes of those in power. For example, several amici served in Washington State, where a voter initiative established a "top-two" primary system that amicus Rob McKenna successfully defended against a constitutional challenge by the major political parties. See *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 444, 447-48 (2008). Voters also have passed initiatives that expanded access to the ballot by smaller political parties,[8] permitted all voting to be accomplished by mail,[9] banned "straight-ticket" voting,[10] or required voters to provide identification at the polls.[11]

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[8] See, *e.g.*, Mass. Gen. Laws Ann. ch. 50 § 1 (West 2014); Peter J. Howe, *Question 4: remaking the political landscape*, Boston Globe, Nov. 25, 1990, at A27.

[9] See Or. Rev. Stat. Ann. § 254.465 (West 2014); see also Lois Romano, *Growing Use Of Mail Voting Puts Its Stamp On Campaigns*, Wash. Post, Nov. 29, 1998, at A1.

[10] Ohio Const. art. V, § 2a (West 2014).

[11] See Miss. Const. art. 12, § 249-A (West 2014); Ariz. Rev. Stat. Ann. § 16 579(A) (West 2014); see also *Purcell* v. *Gonzalez*, 549 U.S. 1, 2 (2006).

2. States have taken important strides to combat gerrymandering

Arizona is one of many States that views gerrymandering as inconsistent with the meaningful right of franchise. Gerrymandering disrupts "the core principle of republican government"—namely, "that the voters should choose their representatives, not the other way around." Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005). Gerrymandering also reduces the accountability and responsiveness of elected officials to the citizens of their State, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 615-16 (2002), and increases partisanship in the House of Representatives, see Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 Wm. & Mary L. Rev. 415, 427-28 (2004).

Gerrymandering of federal seats undermines our democracy irrespective of whether it is done on a partisan basis, by a State's elected officials seeking to maximize their party's seats in the House of Representatives, see Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness As A Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 301-02 (1991), or on a bipartisan basis to keep federal incumbents in power regardless of political affiliation.[12] See Bruce E. Cain et al.,

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[12] For example, after the 2000 census, leaders of both parties in the California legislature agreed to draw a redistricting map that would protect each party's congressional incumbents; in the 2002 congressional election, every incumbent won by landslide margins. See Nicholas M. Goedert, *Redistricting, Risk, and Representation: How Five State Gerrymanders Weathered The Tides of The 2000s*, 13 Election L.J. 406, 409 (2014).

From Equality to Fairness: The Path of Political Reform since Baker v. Carr, in Party Lines Competition, Partisanship, and Congressional Redistricting 23 (Thomas E. Mann & Bruce E. Cain eds., 2005).

Although state legislators may appear to have little incentive to gerrymander federal districts, they reap the "benefits of having very senior legislators who can 'bring home the bacon.'" *An Interstate Process Perspective on Political Gerrymandering*, 119 Harv. L. Rev. 1576, 1589 (2006). In fact, "congressional redistricting is influenced heavily by the efforts of the state's in-party congresspersons to lobby their state counterparts." Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 Cornell J. L. & Pub. Pol'y 443, 444, 463 (2005). Many state legislators have plans to run for Congress, and "redistricting offers the opportunity to draw his or her own future Congressional district." Jocelyn Benson, *How Serpentine Districts Became Law: Michigan Redistricting in 2011*, 13 J. L. Society 7, 10-11 (2011).

In addition to catering to partisan interests, gerrymandering imposes significant burdens on the judicial system. In 2000, there were challenges to redistricting in 21 of the 43 States with more than one congressional district. See James B. Cottrill, Terri J. Peretti, *Gerrymandering from the Bench? The Electoral Consequences of Judicial Redistricting*, 12 Election L.J. 261, 261 (2013). In the 2010 redistricting cycle, there were nearly 100 federal redistricting challenges filed, and only three States with no judicial redistricting challenge. See *Litigation in the 2010 Cycle*, All About Redistricting, Loyola Law School, http://redistricting.lls.edu/cases.php (last visited Jan. 23, 2015). Ultimately, it is taxpayers who bear the burden of these challenges. See, *e.g.*, Peggy Fikae &

David S. Rauf, *Taxpayers' tab for redistricting battle nears $4 million*, Houston Chronicle, Aug. 10, 2014, at B1; Mary Ellen Klas & Michael Van Sickler, *Florida legislators approve new redistricting map but new challenge is expected*, The Miami Herald, Aug. 11, 2014. When infighting over gerrymandered districts renders legislatures unable to pass a redistricting plan, courts are forced to oversee the process of redistricting, or even draw district boundaries themselves—a task for which they are ill-suited. See, *e.g.*, *Perry* v. *Perez*, 132 S. Ct. 934, 941 (2012).

3. Appellant's proposed rule would threaten States' efforts to address not only gerrymandering but also a host of other electoral issues

As appellant's own amicus highlights, States have adopted many different approaches to redistricting and combating gerrymandering. See NCSL Br. 5-17. Six States other than Arizona have independent commissions that draw federal election districts.[13] Two States use commissions as backups to redistrict if their legislatures fail to pass plans.[14] And four States use commissions to advise their legislatures during the redistricting process. See NCSL Br. 5. Amici have a firsthand understanding of the importance of these commissions. Many amici served in Arizona's government, and witnessed the voters' support for the Independent Redistricting Commission, and amicus

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[13] See Cal. Const. art. XXI, § 2; Haw. Const. art. IV, § 2; Idaho Const. art. III, § 2; Mont. Const. art. V, § 14; N.J. Const. art. II, § 2, ¶ 1; Wash. Const. art. II, § 43.

[14] Conn. Const. art. III, § 6(b); Ind. Code § 3-3-2-2 (2014).

Jim Regnier presided over Montana's independent redistricting commission for years.

The diversity of States' approaches is a natural outgrowth of our federal system: States are addressing the problem of gerrymandering differently, for reasons specific to each State and its voters. Appellant threatens this diversity. Reading the Elections Clause as requiring that state legislatures "alone" prescribe federal election regulations would call into question the constitutionality of many of these redistricting approaches. Both independent and backup commissions exercise some amount of redistricting authority that otherwise would be exercised by state legislatures; that is their very purpose. Indeed, providing some level of redistricting authority to entities other than the legislature itself is often the only way to break the partisan logjam. See Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 Harv. L. & Pol'y Rev. 109 (2014).

More fundamentally, any federal election regulation passed by voter initiative depends, at least in part, on bypassing State legislatures. Through state initiatives, the people have pioneered voting reforms and changes in response to various problems, see Sec. B(1), just as they now seek to do with gerrymandering. Amici understand and deeply value the voices of their fellow citizens, and the importance of the initiative power. In Washington State, where several amici served in elected office, voters established their "top two" voting system by initiative, to combat the power of the major political parties. In other States, voter initiatives have improved ballot access for minority parties, addressed voter fraud, or banned straight

ticket voting.[15] All these measures now are threatened.

Some State solutions to election problems like gerrymandering may prove effective, others less so. But States' ability to experiment has proven invaluable to our democracy and should not be set aside by a crabbed reading of the Elections Clause that would limit voter franchise. Appellant's proposed interpretation of the Elections Clause would eliminate a rich and time-honored source of ideas and solutions to make our democracy effective and respected.

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[15] See, *e.g.*, Miss. Const. art. 12, § 249-A (West 2014) (voter identification); Wash. Rev. Code. Ann. § 29A.52.112 (West 2014) (top-two primary); Ariz. Rev. Stat. Ann. § 16 579(A) (West 2014) (voter identification); Or. Rev. Stat. Ann. § 254.465 (West 2014) (vote-by-mail); Mass. Gen. Laws Ann. ch. 50 § 1 (West 2014) (improved ballot access for minority parties and independent candidates); Ohio Const. art. V, § 2a (West 2014) (ban on straight-ticket voting).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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JANUARY 2015

LIST OF AMICI CURIAE

Michael R. Bloomberg served as the Mayor of New York City, from 2002 through 2013. During his tenure as Mayor, Mr. Bloomberg observed the anti-competitive effects of partisan gerrymandering and was a vocal proponent of redistricting reforms. He has actively endorsed concrete redistricting efforts, notably by collaborating with Governor Schwarzenegger in California and by campaigning in favor of amendments to the state Constitution in Florida.

Lincoln Chafee served as a United States Senator from 1999 through 2007 and as the Governor of Rhode Island from 2011 through 2015. During his tenure as Governor, Mr. Chafee witnessed the establishment of a Reapportionment Commission in Rhode Island for the purpose of redistricting and several court challenges concerning redistricting.

Terry Goddard served as Arizona Attorney General from 2003 through 2011, after serving as Mayor of Phoenix from 1983 through 1990. He has been a vocal proponent of the right of the people of Arizona to take redistricting out of the partisan political arena, and has denounced past partisan attempts to undermine the Arizona Independent Redistricting Commission (IRC).

Christine Gregoire served as the Attorney General of the State of Washington from 1993 through 2005 and, thereafter, as Governor of the State from 2005 through 2013. In both these positions, she witnessed firsthand the gridlock and delays created by partisan redistricting. While she served as Governor, the voters of the State of Washington used popular

initiatives on many occasions, so she is familiar with the importance of that power.

Gary King served as Attorney General of New Mexico from 2006 through 2015. As such, he witnessed New Mexico's 2011 redistricting process and the ensuing legal challenges.

Rob McKenna served as Attorney General of Washington from 2005 through 2013. During his time in office, he successfully defended Washington's top-two primary system, which was adopted by voter initiative. See *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442 (2008). He is therefore familiar with how States can utilize direct democracy to experiment with different manners of holding elections. He is familiar with the problems caused by gerrymandering.

Janet Napolitano served as the Governor of Arizona from 2003 through 2009, Attorney General of Arizona from 1999-2003, and as Secretary of Homeland Security from 2009 through 2013. The IRC was created during her tenure as Attorney General. As a former Governor of Arizona, she is familiar with the voter initiative process that created the IRC, the IRC's functioning, as well as the ongoing debates and court challenges in Arizona relating to redistricting.

Martin O'Malley served as the Governor of Maryland from 2007 through 2015, after having served as the Mayor of Baltimore from 1999 to 2007. In 2011, he signed legislation redrawing Maryland's state and federal district boundaries. Court challenges to the redistricting plan were rejected, and in a 2012 referendum, 64% of Maryland voters approved the redrawn districts.

Sam Reed served as Secretary of State for the State of Washington from 2000 through 2013. He supported the voter initiative that established Washington's "Top-Two" primary system, and defended it alongside amicus Rob McKenna. He is therefore deeply concerned with preserving the States' rights to experiment, through direct democracy, with different manners of holding elections. As a former Secretary of State, he was also in charge of supervising elections, and thus has a strong interest in redistricting issues.

Edward G. Rendell served as the Governor of Pennsylvania from 2003 through 2011. During his tenure, he called for an amendment to the state constitution that would create a bipartisan citizen's redistricting commission, similar to the IRC.

Jim Regnier served as a Montana Supreme Court Justice from 1997 through 2005 and Presiding Officer of the Montana Districting and Apportionment Commission from 2009 through 2013. Similarly to the IRC, the Commission is an independent body that adopts a binding redistricting plan for the State. During his tenure, the Commission held fourteen public hearings to solicit the opinions of the population of Montana and achieved a bipartisan compromise on redistricting among the commissioners (i.e., the Majority and Minority Leaders of the State's House and Senate).

Dennis Vacco served as New York State Attorney General from 1995 through 1998. He is familiar with the political arena and, as a former prosecutor and current practicing lawyer who interfaces regularly with the government, is knowledgeable about the dis-

torting effects that gerrymandering can have on government.

Grant Woods served as Attorney General of Arizona from 1991 through 1999. He lent public support to Proposition 106 (the voter initiative creating the IRC), explaining that having elected officials redraw electoral districts creates a fundamental conflict of interest.

Kim Wyman currently serves as the Secretary of State for the State of Washington, having assumed office in 2013. As such, her tasks include supervising state and local elections, certifying the results of state primaries and general elections, and filing and verifying initiatives and referendums. Preserving the integrity of elections in Washington State is one of her missions. Consequently, she has a strong interest in redistricting and its attendant issues.

AMICUS CURIAE BRIEF

No. 13-1314

In The Supreme Court Of The United States

ARIZONA STATE LEGISLATURE,

APPELLANT,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

RESPONDENTS.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

AMICUS BRIEF OF THE STATES OF WASHINGTON, CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, IDAHO, MASSACHUSETTS, MISSISSIPPI, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, AND VIRGINIA IN SUPPORT OF RESPONDENTS

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INTRODUCTION

States' sovereign powers rest ultimately with their people, not their legislatures. And in joining our federalist union, States retained the inherent ability to structure their own governments, including their lawmaking processes. The Arizona Legislature asks this Court to abandon both principles, override the will of Arizona voters, and adopt a reading of the Elections Clause that is contrary to precedent and an infringement on States' sovereign prerogatives.

This Court should reject the unworkable reading offered by the Arizona Legislature and instead follow its own holdings, in *Smiley* and *Hildebrant*, that States may use their ordinary lawmaking processes to establish the "Times, Places and Manner" of congressional elections. Relying on that century of precedent, many States have enacted by popular initiative laws that regulate every aspect of election practice, from how voting is conducted, to the redistricting process, to what voter identification is required, to what candidates advance from the primary to the general election. No state legislature played any role in enacting these initiatives. Accepting the Arizona Legislature's argument could call all such laws into question and require a state legislature's stamp of approval for laws enacted by the people even when the people of a State have decided in their state constitution to remove certain authority from the legislature and even when the people of a State reserved the initiative power to themselves before joining the Union. Nothing in the Elections Clause requires this Court to override popular democracy and the will of the people.

INTEREST OF AMICI CURIAE

This Court has long recognized that the sovereign States have "wide discretion" in determining how their citizens will select their members of Congress. *United States v. Classic*, 313 U.S. 299, 310-11 (1941). States have adopted widely varying congressional redistricting systems. Some involve unregulated decisions by the legislature, some allow control by the legislature within strict parameters set by the people, some require state courts or backup redistricting commissions to adopt plans if the state legislature fails to do so, while some States use independent commissions. These systems have been adopted by constitutional convention, by legislative vote, by popular vote after having been proposed by the legislature, or by the people alone. The States have an interest in protecting their sovereign ability to choose the system that is most effective for each of them.

States that have adopted independent redistricting commissions have a special interest in defending the use of such commissions here. Voters in these States have concluded that such commissions advance important goals, such as reducing incumbent protectionism and partisan gerrymandering, and helping avoid redistricting litigation, goals these States are undoubtedly entitled to pursue.

More broadly, the sovereign States are vitally interested in avoiding the harm that would come from adopting the Arizona Legislature's

reading of the Elections Clause.[1] Many States have adopted time, place, and manner laws impacting congressional elections by popular initiative, consistent with those States' constitutions but without any involvement of the state legislature. These laws cover a variety of important election subjects, from primary election processes to voting by mail to voter identification requirements. The variety of these laws shows that the amici States do not always agree with policy choices made by other States. But the amici States do agree that these common election laws are imperiled by the Arizona Legislature's argument that the word "Legislature" in the Elections Clause is a talisman prohibiting lawfully adopted initiatives from regulating congressional elections.

The amici States want the Court to maintain its longstanding reasoning, recognizing the States' authority to use the legislative processes their people have adopted to enact laws concerning congressional elections. The Court should decline to adopt any holding that casts doubt on the validity of state election laws or state constitutional provisions adopted by the people.

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[1] U.S. Const. art. I, § 4, cl. 1. The amici States' arguments thus address the interpretation of the Elections Clause, and do not necessarily apply to other constitutional provisions concerning the state legislative process. *Cf. Smiley v. Holm*, 285 U.S. 355, 366 (1932) (Noting: "Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view.").

SUMMARY OF ARGUMENT

The power to legislate and to amend their own state constitutions is inherent in the people and reserved to them as a matter of bedrock constitutional principle in many States. State constitutions frequently retain for the people the authority to exercise the States' legislative powers.

Recognizing States' sovereign authority to structure their own governments, this Court has held that States may regulate congressional elections through their ordinary lawmaking processes, even if those processes involve entities other than the legislature. In turn, the States have taken widely varied approaches to congressional redistricting, each State reflecting the priorities and judgment of its people. Many States have also adopted, purely by citizen initiative, other laws that address the time, place, or manner of congressional elections.

This Court has long held that legislative actors other than state legislators can play determinative roles in enacting laws regulating congressional elections. If the Court were to accept the Arizona Legislature's argument that the state legislature must play an outcome-defining role in adopting all time, place, and manner laws affecting congressional elections, the Court would not only call into question independent redistricting commissions, but also the States' sovereign prerogative to adopt other laws regulating congressional elections by initiative. The amici States therefore join the Arizona Independent Redistricting Commission in asking the Court to reject the Arizona Legislature's arguments and affirm the three-judge panel's decision.

ARGUMENT

A. The States, As Sovereigns, Are Entitled To Structure Their Lawmaking Processes As They See Fit

One of the most fundamental principles of our government is that "'the States entered the federal system with their sovereignty intact[.]'" *Alden v. Maine*, 527 U.S. 706, 713 (1999) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). The Federal Constitution "reserve[d] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714. As a result, each State has "constitutional responsibility for the establishment and operation of its own government," *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991), "[t]hrough [which the] State defines itself as a sovereign." *Id.* at 460. Members of this Court have described a State's sovereignty to design its own governing structure, including its structure for lawmaking, as "near-limitless." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1646 (2014) (Scalia, J., concurring) (citing *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978)). A State "is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Holt Civic Club*, 439 U.S. at 71 (discussing allocation of lawmaking power to local governments).

As sovereigns that preexisted the Union, or as sovereigns that joined the Union on equal footing with the original States, every State may assign its lawmaking powers in the manner it deems

best. *See Holt Civic Club*, 439 U.S. at 71. And while every State has chosen to create a legislature and assign many lawmaking functions there, virtually every State has also placed significant lawmaking power elsewhere, because political sovereignty is inherent in the people, and they can assign the legislative power as they see fit.

The most prominent and fundamental example is that many States emphatically reserve to their people the legislative power to enact laws through initiative or disapprove laws through referendum. *See, e.g.*, Wash. Const. art. II, § 1 ("The legislative authority of the state of Washington shall be vested in the legislature *but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature*, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature." (Emphasis added.)); *see also* Cal. Const. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."); Or. Const. art. IV. § 1(2)(a); Ohio Const. art. II, § 1.

This reservation of legislative power is based on the principle that the States are founded pursuant to the people's authority to govern themselves. *See Carter v. Lehi City*, 269 P.3d 141, 148 (Utah 2012). The initiative and referendum powers are not rights granted to the people, but powers that the people reserved for themselves. *Rossi v. Brown*, 889 P.2d 557, 560 (Cal. 1995). All

political power is inherent in the people, and they have the authority to allocate lawmaking power in their state constitutions, as well as the authority to retain some of that lawmaking power. *Carter*, 269 P.3d at 148-49. Thus the people's initiative power is coextensive with the power of the legislature in many States. *Id.* at 150 (listing, as examples, cases so holding from Washington, North Dakota, and Oregon); *see also, e.g.*, *Luker v. Curtis*, 136 P.2d 978, 979 (Idaho 1943) (virtually from inception of Idaho's direct legislation provisions, initiated legislation found to be on equal footing with that adopted by legislature).

Justices of this Court have therefore recognized the foundational nature of the States' prerogative to retain some portion of the legislative power for the people. *See, e.g.*, *Kansas v. Marsh*, 548 U.S. 163, 184 (2006) (Scalia, J., concurring) (emphasizing there are circumstances where this Court is called upon to vindicate the will of the people duly expressed through their initiative power).

Most States' constitutions allocate legislative powers to other entities as well. For example, when Governors exercise their veto power, it is a legislative function, not an executive one. *E.g.*, *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371, 1378 (Colo. 1985) ("Certainly the governor possesses legislative power to the extent of that official's ability to veto legislation."); *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 598 (Tex. 1975) ("[Governor's] veto power is a legislative function and not an executive function, and it exists only to the extent granted by the Constitution."); *Wood v. State Admin. Bd.*,

238 N.W. 16, 18 (Mich. 1931) (recognizing state constitution granted a limited legislative veto power to the executive); *Fairfield v. Foster*, 214 P. 319, 320 (Ariz. 1923) (recognizing veto power "was originally based on a similar power exercised by the English sovereign" and that it is "essentially legislative in its nature").

The people of Arizona created the Arizona Independent Redistricting Commission pursuant to this "near-limitless" sovereign authority to structure their own government. It deserves the respect owed to every State's decisions as to distribution of its lawmaking powers.

B. The Elections Clause Does Not Disturb The States' Sovereign Authority To Allocate Lawmaking Power To Entities Other Than The Legislature

Like the States' sovereign power to establish lawmaking processes generally, the States' power to establish laws governing the conduct of congressional elections is broad: "The States possess a broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives, Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) (internal quotation marks omitted).

Recognizing States' broad authority on this front a century ago in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), this Court held that the people of a State could override the state legislature's redistricting plan through popular

referendum. The Court's rationale was not, as the Arizona Legislature suggests, that the Ohio Legislature retained a sufficient role in redistricting to somehow satisfy the spirit of the Elections Clause. Br. For Appellant at 45. Rather, "it was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections, was sustained." *Smiley v. Holm*, 285 U.S. 355, 372 (1932) (describing *Hildebrant*). Just a few years later in *Smiley*, the Court confirmed this view, holding that the Elections Clause allows for a gubernatorial veto of a congressional redistricting plan, even though the Governor was not part of the Minnesota Legislature. *Id.* The important thing, the Court emphasized, is that the function contemplated by the Elections Clause "is that of making laws," *id.* at 366, and it is within "the authority of the state to determine what should constitute its legislative process," *id.* at 372.

Finally, as discussed in more detail below, this Court has held that even state courts, far-removed from the state legislature, can craft redistricting systems if other, more traditional legislative actors fail to do so. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) (emphasizing the "legitimacy of state *judicial* redistricting") (citing *Scott v. Germano*, 381 U.S. 407, 409 (1965)).

Under these cases, the important question is not whether the state legislature plays an "outcome-defining role" in establishing a redistricting plan (whatever that means), but rather whether a State used its legislative process to adopt a redistricting system. That requirement is satisfied here, where

the people of Arizona, through their ordinary legislative process, specified how redistricting should be conducted, and allocated that responsibility to a body that acts in a legislative capacity.

C. The Arizona Legislature's Argument Threatens States' Diverse Redistricting Systems, Which Often And For Good Reason Place Significant Power Outside The Legislature

This Court has an "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of [the Constitution], to experiment with solutions to difficult problems of policy." *Smith v. Robbins*, 528 U.S. 259, 273 (2000). Several States perceive problems in redistricting schemes that give the state legislature unfettered power to draw a redistricting plan. These States have exercised their sovereignty to adopt a variety of systems to address these problems. The Elections Clause should not be turned into a one-size-fits-all mandate, yet the Arizona Legislature asks this Court to do just that by adopting a rule that would threaten a wide range of State choices. The Court should decline that request and preserve the sovereign choices of States, including the choice of the people of Arizona.

1. Some States Give Their Courts Authority To Redistrict If The Legislature Fails By A Certain Date

In some States, the courts must wholly create a redistricting plan, without approval from the legislature, if the legislature fails to adopt a plan by a certain date. *E.g.*, Maine Const. art. IX, § 24;

Hippert v. Ritchie, 813 N.W.2d 391, 395 (Minn. 2012). While these systems offer the state legislature the first opportunity to adopt a plan, if the legislature fails, it has no input in or control over the redistricting plan adopted by the court. Maine Const. art. IX, § 24; *Hippert*, 813 N.W.2d at 395; *see also* Nev. Rev. Stat. § 218B.150 (Legislative Counsel Note, indicating Nevada state court special masters created congressional redistricting maps). These examples cannot be dismissed as courts supervising or simply passing judgment on a plan drafted by the legislature. When the legislature fails to adopt a plan, these courts must independently adopt redistricting plans in order for the next congressional election to move forward in that State.

In *Growe*, this Court acknowledged this reality, recognizing that state courts play this "significant role in redistricting." *Growe*, 507 U.S. at 33. It explained that a Minnesota state court could create a congressional redistricting plan where the legislature had failed to do so. *Id.* at 34-36; *see also Lance v. Coffman*, 549 U.S. 437, 438 (2007) (describing state court-adopted redistricting plan); *Wesberry v. Sanders*, 376 U.S. 1, 5 (1964) (Elections Clause does not prevent even federal courts from remedying improper line drawing created by a state legislature).

The Arizona Legislature suggests that *Growe* stands only for the proposition that courts generally may play a remedial role when legislatures fail to redistrict. Br. For Appellant at 51-53. That cannot be correct. If the Elections Clause granted power only to state legislatures, rather than to States more generally, why would this Court so emphatically

have required that state *courts* be given the first opportunity to conduct redistricting before a federal court steps in? As the *Growe* Court itself put it, Appellant's position is "based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts." *Growe*, 507 U.S. at 34.

A hypothetical example demonstrates the flaw in Appellant's claim. Imagine that a divided state legislature in one of these States failed to adopt a redistricting plan by the date specified in the state constitution, and the state courts then adopted a plan that did little to protect incumbents. If the legislature then overcame its partisan differences and passed an incumbent-protection plan, Appellant's argument would require that the incumbent-protection plan be used, because there is no longer a need for a "remedial" court plan. But would this Court really hold that the Elections Clause overrides the process specified in the state constitution under those circumstances?

The Arizona Legislature's argument that the Elections Clause requires the state legislature to play an outcome-defining role, Br. For Appellant at 40, thus cannot be reconciled with this Court's approval of state-court-drawn plans in *Growe*. In fact, the use of state courts to draw redistricting plans where the legislature has failed to meet a particular deadline can and often does result in state redistricting plans that have had no legislative input whatsoever. *E.g.*, Maine Const. art. IX, § 24; *Hippert*, 813 N.W.2d at 395; *see also* Nev. Rev. Stat. § 218B.150 (Legislative Counsel Note). If the word "Legislature" in the Elections Clause is interpreted

to mean *only* the state legislature and no other legislative actor, the Elections Clause could, for no good reason, deprive the States of this important safety valve when political impasse prevents a legislature from adopting a redistricting plan.

2. Some States Give A Backup Commission Authority To Create A Districting Plan If The Legislature Fails By A Certain Date

Similarly, some state constitutions provide for a backup redistricting commission that creates the redistricting plan if the legislature fails to do so by a particular date. The Arizona Legislature's argument threatens these systems as well.

For example, Indiana provides for a five-member backup commission made up of four legislators and a governor's appointee from the General Assembly. Ind. Code § 3-3-2-2. The commission's plan must be adopted by executive order of the governor, without legislative approval. *Id.* In Connecticut, a backup commission adopts a plan that is not subject to legislative approval, and if the commission fails, the state supreme court then establishes the districting plan. Conn. Const. art. III, § 6(c), (d).

Like state-court-created plans, redistricting plans created by backup commissions are used after the legislature has failed. It is the sovereign authority to create lawmaking processes that allows the States to choose a backup commission as a safety valve rather than a state or federal court. *See Holt Civic Club*, 439 U.S. at 71. Again, if the word "Legislature" in the Elections Clause is interpreted

to mean *only* the state legislature, and no other legislative actor, the Elections Clause would deprive States of this redistricting tool.

3. Several States Have Chosen Independent Commissions To Create Their Redistricting Plans

A number of States besides Arizona redistrict through independent commissions whose members are appointed. While none of these systems is identical, and all differ from Arizona's, the Arizona Legislature's arguments threaten all of them.

For example, Idaho's redistricting commission has six members appointed by legislative and political party leaders. Idaho Const. art. III, § 2(2), (4) (proposed by the 1994 Idaho legislature by a two-thirds vote in each house and ratified by the people). The Idaho Commission's plan is not subject to the legislature's approval. *Id.* art. III, § 2(5).

Hawaii's has eight commission members appointed by certain individual legislative leaders, with a ninth member appointed by the other commissioners. Haw. Const. art. IV, § 2 (originally adopted by 1978 constitutional convention and ratified by the people). The commission's plan becomes law without legislative approval. *Id.*

While Montana currently has only one congressional representative, its constitution provides that a five-member independent redistricting commission shall draw congressional districts, which become law without the legislature's approval. Mont. Const. art. V, § 14 (adopted by constitutional convention 1972).

New Jersey's constitution provides for a thirteen-member redistricting commission. N.J. Const. art. II, § 2(1) (approved by NJ voters in 1995). Twelve members are appointed by individual legislative and political party leaders, while the last member is appointed by the other appointees, or the state supreme court if they cannot agree. *Id.* art. II, § 2(1)(a)-(c). The commission's plan becomes law without the legislature's approval. *Id.* art. II, § 2(3). If the commission cannot approve a plan by a certain date, the state supreme court selects the plan. *Id.*

Washington's constitution provides for a five-member redistricting commission, four appointed by legislative leadership, with the fifth, non-voting chair appointed by the other commissioners. Wash. Const. art. II, § 43 (proposed by 1983 legislature, approved by people). The legislature may amend the redistricting plan adopted by the commission, but doing so requires a two-thirds vote of each house. *Id.* art. II, § 43(7).

California's Constitution creates a fourteen-member redistricting commission consisting of five members who are registered with the largest political party in California based on registration, five who are registered with the second largest party, and four who are not registered with either of the two largest parties. Cal. Const. art. XXI, §§ 1, 2(a)-(c). Commissioners are selected from a pool of qualified candidates through an independent process, although the majority and minority leaders of both houses of the state legislature may each strike up to six candidates from the pool before the selection. Cal. Gov't Code § 8252. The final map

prepared by the commission is subject to referendum in the same way as any other statute. Cal. Const. art. XXI, § 2(g), (i). If the commission fails to adopt a redistricting plan by the deadline, or if the people reject the commission's plan by referendum, then the state supreme court is responsible for appointing special masters to create a plan, which is subject to the court's, but not the legislature's, approval. *Id.* art. XXI, § 2(j).

In Iowa, the non-partisan Legislative Service Agency by statute is responsible for drawing the redistricting plan. Iowa Code § 42.3. The plan is then presented to the legislature, which can approve or disapprove, but cannot amend, the agency's plan. *Id.* If the first plan is disapproved, the agency must submit a second plan. *Id.* The legislature becomes able to amend the agency's plan only after it has previously rejected two plans. *Id.*[2]

The people of these States perceived a number of benefits from adopting redistricting commissions. For one, the people of these States have found their redistricting commissions less likely than state legislators to engage in gerrymandering to protect incumbents or to manipulate the redistricting process for partisan gain. *See, e.g.*, Nicholas D. Mosich, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting*

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[2] New York very recently adopted a constitutional amendment under which a redistricting commission must propose a redistricting plan to be approved by the legislature. N.Y. Const. art. III, §§ 4 to 5-b. The legislature can amend the plan only after it has twice rejected the commission's proposals. *Id.*

Commission, 79 S. Cal. L. Rev. 165, 171-72 (Nov. 2005) (describing partisan and incumbent Gerrymandering in Texas and California that resulted from those state legislatures' redistricting). While the Arizona Legislature and its amici embrace these problems as necessary evils, the sovereign States surely have authority to find that incumbent and partisan gerrymandering restrict electoral competition and lead to government that has less incentive to be responsive to the people. Mosich, 79 S. Cal. L. Rev. at 173, 175.

Some States have also found that commissions help avoid costly, time-consuming litigation challenging redistricting plans or resulting from political impasses and thus help ensure that redistricting is completed on time and not ongoing throughout the decade because of legal challenges. Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical / Bipartisan Legislative Redistricting Commissions*, 13 Kan. J.L. & Pub. Pol'y 115, 131-32 (Winter 2003/2004) (describing the higher number of court challenges to legislature-drawn plans versus commission-drawn plans); *see also Essex v. Kobach*, 874 F Supp. 2d 1069, 1073-75, 1079 (2012) (three-judge panel was forced to independently draw a redistricting plan after Kansas Legislature could not do so because of ideological impasse); Nev. Rev. Stat. § 218B.150 (Legislative Counsel Note).

Though the Arizona Legislature never says so explicitly, its arguments amount to an attack on all of these systems and the benefits they provide. The Arizona Legislature claims that every state legislature must be able to "dictate, ordain, or direct"

the contents of a redistricting plan, and that legislators' ability to appoint commission members is insufficient. Br. For Appellant at 39-40. But this Court has already held that the Elections Clause does not prohibit States from giving actors other than the legislature—such as the people and the Governor—a crucial role in redistricting, rejecting the narrow rule Appellant advances. *See Smiley*, 285 U.S. at 372; *Hildebrant*, 241 U.S. at 567-68. And it has held that state courts can adopt redistricting plans themselves. *See Growe*, 507 U.S. at 32. These holdings are likewise consistent with the Court's more general principle that States have "wide leeway when experimenting with the appropriate allocation of state legislative power," *Holt Civic Club*, 439 U.S. at 71, and broad discretion to experiment with solutions to problems like gerrymandering, *Smith*, 528 U.S. at 273. States that have adopted commission systems are undoubtedly using the powers contemplated by our federalism. An overly restrictive reading of the Elections Clause should not be permitted to undermine this valid exercise of their authority to govern their own lawmaking process.

D. The Arizona Legislature's Argument Threatens Innumerable Laws Regulating The Time, Place, And Manner Of Congressional Elections That States Have Enacted By Initiative

Late in the brief, the Arizona Legislature candidly admits that its argument is not "limited to redistricting, as *any* prescription of the regulations concerning the times, places, and manner of congressional elections is just as surely a legislative task." Br. For Appellant at 49 (emphasis added). The

Arizona Legislature thus challenges not just redistricting systems adopted by the people, but also any state statute or constitutional amendment regulating congressional elections adopted by initiative. Multiple States have such rules, covering virtually every aspect of congressional elections. The variety of these laws reveals sometimes diverging policy choices, but while the substance of these laws varies, all of these States have relied on their sovereign right to adopt laws by initiative. The Court should follow its own precedent, reject Appellant's position, and preserve the sovereign States' right to regulate congressional elections through their ordinary legislative processes, including by direct democracy.

The time, place, and manner laws governed by the Election Clause cover a broad range of topics. They include matters involving "'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (quoting *Smiley*, 285 U.S. at 366). Laws governing primaries and voter registration procedures are also generally regarded as falling under the Elections Clause. *United States v. Classic*, 313 U.S. 299, 317 (1941) (primaries generally fall under Elections Clause); *Ass'n of Cmty. Orgs. For Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793-94 (7th Cir. 1995) (registration is embraced within the "manner" of holding elections).

For over a century, States have adopted statutes and constitutional amendments falling

within these categories by initiative, and this Court has never questioned their ability to do so. For example, two States, Arizona and Oregon, granted women suffrage through constitutional amendments initiated by the people. Or. Const. art. II, § 2 (amendment proposed by initiative petition in 1910 and adopted by voters in November 1912);[3] Ariz. Const. art. VII, § 2 (approved November 1912).[4] Oregon adopted a primary election system by initiative in 1904.[5] In 1912 and again in 1918, South Dakota voters enacted initiatives modifying their primary election systems.[6] In 1932, Washington voters adopted an initiative providing for permanent voter registration.[7]

This long tradition has continued nationwide, covering a wide range of topics. In Washington, for example, the people adopted Washington's current

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[3] http://arcweb.sos.state.or.us/pages/exhibits/1857/after/initiative.htm (Oregon State Archives, *Crafting The Oregon Constitution*).

[4] Zachary A. Smith, *Politics and Public Policy in Arizona* 128-29 (2002).

[5] http://bluebook.state.or.us/state/elections/elections10.htm (*Initiative, Referendum and Recall: 1902-1906*, Oregon Blue Book).

[6] *South Dakota Political Almanac* 34, 36, *available at* http://sdsos.gov/elections-voting/assets/BallotQuestions1890-2010.pdf.

[7] Washington Voters' Pamphlet 3 (1932), *available at* http://www.sos.wa.gov/elections/voters-pamphlets.aspx (click on 1932); *see* 1932 Election Results (Wash), http://www.sos.wa.gov/elections/results_report.aspx?e=102&c=&c2=&t=&t2=5&p=&p2=&y=.

primary system by initiative. Wash. Initiative Measure 872 (2005).[8] In upholding this system against a constitutional challenge, this Court emphasized that the law was popularly enacted and expressed a reluctance to nullify the will of the people. *Washington State Grange v. Washington Republican Party*, 552 U.S. 442, 446-47, 458 (2008).

Both Arizona and Mississippi have enacted voter identification requirements by initiative.[9] Mississippi's Initiative 27 amended the Mississippi Constitution in 2011 without any legislative approval.[10] Miss. Const. art. XII, § 249a. It requires voters to present government-issued identification in order to vote. *Id.* In 2004, Arizona voters adopted Proposition 200, requiring voters to present identification in order to vote. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2252 (2013).[11] Like Mississippi, exercise of Arizona's initiative power does not require participation or approval of the legislature. Ariz. Const. art. IV, pt. 1, § 1.

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[8] www.secstate.wa.gov/elections/initiatives/text/i872.pdf (text of Initiative 872).

[9] As noted, the amici States are not endorsing the policy choices reflected in all of these laws, but simply noting the wide range of laws enacted by initiative that regulate congressional elections.

[10] http://www.sos.ms.gov/Initiatives/Voter%20Identification-PW%20revised.pdf (voter identification pamphlet describing the initiative and Mississippi's initiative process).

[11] The *Inter Tribal Council* Court held that federal law preempted a portion of Arizona's legislation. *Inter Tribal Council*, 133 S. Ct. at 2260.

There are countless examples of other state constitutional amendments adopted by the people that regulate congressional elections. Ohio has both adopted a voter registration provision and abolished straight ticket voting through popular initiatives to amend its constitution. Ohio Const. art. V, § 1 (elector failing to vote in four years must re-register),[12] art. V, § 2a (requiring candidates for office in general election to be arranged in a group under that office and each candidate must be voted separately), art. II, § 1g (permitting people to propose and adopt constitutional amendment without legislative approval); *State ex rel. Duffy v. Sweeney*, 89 N.E.2d 641, 642 (Ohio 1949) (explaining article V, section 2a was adopted by popular initiative in the November 1949 general election).

Similarly, Arkansas has adopted at least two constitutional provisions impacting the time, place, and manner of congressional elections by popular initiative. In 1938, the people adopted a provision addressing how candidates obtain access to the ballot, and in 1962 the people adopted an amendment permitting the use of voting machines. Ark. Const. amend. 29, § 5 (initiative petition approved at November 1938 election), amend. 50, §§ 2, 4 (initiative petition approved at November 1962 election), amend. 7 (reserving to the people the power to propose amendments to the constitution without input from the legislature).

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[12] http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110877.aspx (listing Ohio's 1977 constitutional amendments proposed by initiative petition).

Oregon voters again amended the Oregon Constitution's provision addressing the qualifications of electors by initiative in 1986. *See* Or. Const. art. II, § 2 (amendment proposed by initiative petition July 1986 and adopted by voters November 1986).[13] Oregon also enacted its highly successful vote-by-mail requirement for biennial primary and general elections through popular initiative. 2007 Or. Laws, ch. 154 § 1 (Measure 60); *see also* Or. Const. art. IV, § 1 (reserving initiative power to enact laws independently of the legislature).

In 2010, Florida voters amended their constitution to provide criteria that the state legislature must follow in congressional redistricting. Fla. Const. art. III, § 20 (adopted at the November 2010 general election as a result of a proposed initiative petition); *see also id.* art. XI, § 3 (permitting constitutional amendment by popular initiative).

Other States have adopted statutes affecting congressional elections by popular initiative. In 1990, Massachusetts adopted an initiative changing the law to ease the requirements for establishing new political parties. 1990 Mass. Acts page nos. 744-46 (ch. 269); *see also* Mass. Const. amend. art. XLVIII, The Initiative, pt. V. § 1 (permitting the people to propose statutes by initiative and adopt them by popular vote, even if Massachusetts Legislature failed to adopt the proposed law). More recently, Alaska voters amended statutes addressing the process for temporary replacement of a United States

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[13] *See also* http://bluebook.state.or.us/state/constitution/constitution02.htm (information page).

Senator. State of Alaska, Official Election Pamphlet 98-99 (2004), *available at* www.elections.alaska.gov/doc/oep/2004/2004_oep_reg_3.pdf; Alaska Const. art. XI.[14]

This Court's recognition that popularly enacted laws express the will of the people is not hollow rhetoric. *See Washington State Grange*, 552 U.S. at 446-47, 458. Direct democracy is an established and critical aspect of state sovereignty throughout the United States. If this Court holds that only a state legislature can adopt a law that affects the time, place, or manner of congressional elections, the Court will throw a cloud of uncertainty over initiative-adopted election laws going back to 1904. *See* Br. For Appellant at 49 (acknowledging that the Elections Clause applies to any regulations concerning the time, place, and manner of congressional elections). The Court should refuse to read the Elections Clause to impose such a restriction on States' sovereign power.

E. Respecting State Sovereignty To Choose Lawmaking Processes Serves Important Federalism Values

At times, the Arizona Legislature seeks to frame this as a narrow case, solely about whether a State may "completely divest" its legislature of control over redistricting (a misleading formulation given the Arizona Legislature's appointment power). Elsewhere, the Arizona Legislature suggests that the legislature must "dictate" not only redistricting

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[14] *See also* http://www.elections.alaska.gov/results/04GENR/data/results.htm (information page).

plans, but any law regulating congressional elections. Br. For Appellant at 39-40, 49. The Court should reject this shifting argument and follow the reasoning in its prior Elections Clause cases, which allows States to use their chosen legislative processes to enact laws regulating congressional elections. Doing so would preserve our federalism where States, as sovereigns, choose their own lawmaking processes, including as to congressional redistricting. At the very least, this Court should avoid any broad holding that would call into question States' ability generally to use popular democracy to adopt laws regulating congressional elections.

"It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). This principle is especially strong when it comes to the States' power to structure their governments and legislative processes. *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991); *Holt Civic Club*, 439 U.S. at 71. The values recognized in *Younger*, *Gregory*, and *Holt Civic Club* are just as important here.

Once again, this Court must consider the "proper respect for state functions" and recognize "the fact that the entire country is made up of a Union of separate state governments, and the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44. As in *Younger*, the federalism that animates the Federal Constitution must be "sensitiv[e] to the legitimate interests of

both State and National Governments" and that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that *will not unduly interfere with the legitimate activities of the States*." *Younger*, 401 U.S. at 44-45 (emphasis added).

One way that the Court can maintain these principles of federalism in this case is to determine that the Arizona Legislature is asking the Court to address a non-justiciable political question. The Court similarly held in *Hildebrant* that whether exercise of the people's lawmaking power in the course of redistricting violates the guarantee of a republican form of government is a question exclusively for Congress. *Hildebrant*, 241 U.S. at 569-70. Indeed, this Court has long held that questions related to the Guarantee Clause are squarely political, not judicial questions. *Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cnty.*, 281 U.S. 74, 79-80 (1930) (listing cases). Included, of course, are questions related to whether the exercise of the people's power through initiative and referendum violates this guarantee. *Kiernan v. City of Portland*, 223 U.S. 151, 163-64 (1912) (declining to exercise jurisdiction over whether exercise of the then-new initiative and referendum powers violated the republican form of government).

If this Court does reach the merits, however, the approach that is properly sensitive to the sovereign role of the States is found in *Smiley* and *Hildebrant*. The Elections Clause contemplates exercise of the States' lawmaking power, whether exercised by the state legislature or other actors. *See*

Smiley, 285 U.S. at 368-69, 371. States retain their sovereign powers to use referenda when it is part of the State's lawmaking powers under its constitution. *Hildebrant*, 241 U.S. at 568-70. This recognition is critical, because many States have, for over a century, retained and reserved legislative power to their people in their state constitutions. *See supra* pp. 19-21 (listing examples). Still other States have reserved power to the people to amend the State's constitution. Ariz. Const. art. XXI, § 1; Cal. Const. art. XVIII, § 3; Mont. Const. art. XIV, § 9. These lawmaking powers are the very legislative power contemplated by the Elections Clause, when it is read to serve the purposes of our federalism.

In contrast, the Arizona Legislature's position that every state legislature must play an outcome-defining role in congressional redistricting cannot be reconciled with our federalism and the broad sovereign state powers contemplated by the framers. This "outcome-defining" test would threaten all independent redistricting commissions whose plans are not subject to legislative approval, as well as plans adopted by backup commissions, courts, special masters, or any other situation where the legislature itself has not dictated the outcome. Equally troubling, it would imperil any state laws regulating the time, place, and manner of congressional elections that were adopted by initiative or constitutional amendment. And the vagueness of the "outcome-defining" test would require this Court to address more questions, such as whether a legislature's power to amend a commission's plan by a two-thirds vote is a sufficiently "outcome-defining" role. Wash. Const. art. II, § 43(7) (providing for

legislative amendment of a redistricting plan only when the legislature can muster a two-thirds vote of each house within thirty days). Or, is it a sufficiently "defining role" if a legislature proposed the constitutional amendment that led to the redistricting commission? Wash. Const. art. II, § 43; Idaho Const. art. III, § 2; N.J. Const. art. II, § 2(1).

Not surprisingly, the Arizona Legislature also proffers a softer argument, stating that it is concerned only with the complete and permanent divestiture of a legislature from congressional redistricting. *E.g.*, Br. For Appellant at 36. This test might serve the result-driven goal of overcoming the Arizona Constitution (though not necessarily, given the legislature's power to appoint the commission in Arizona), and it would probably cause less collateral damage to the States. But it is an unprincipled, result-driven view that still would mean that the Elections Clause was adopted to interfere with the future States' inherent sovereign power to determine their own lawmaking processes.

The amicus National Council of State Legislatures asks the Court to craft a rule that depends upon whether legislators have unrestrained ability to choose redistricting commission members, rather than choosing from a list as in Arizona. Br. of Amicus NCSL at 4-5. This analysis does not withstand scrutiny and finds no basis in precedent. If "the Legislature" can simply mean certain individual legislators who select commission members, why can it not also mean the voters of a State, who have chosen a redistricting system by popular vote? It also could lead to all sorts of bizarre line-drawing, e.g., what if the tie-breaking redistricting commissioner is

not appointed by a legislator at all? *See* Haw. Const. art. IV, § 2 (commission appointees appoint tiebreaker); N.J. Const. art. II, § 1(c), 2 (same); Ill. Const. art. IV, § 3 (supreme court can appoint tiebreaker); Ind. Code § 3-3-2-2 (governor appoints tiebreaker). In the end, the NCSL proposal is best viewed as a policy option, but far from a constitutional imperative required by the Elections Clause.

Last, the amicus Coolidge-Reagan Foundation suggests that it is the manner in which the Arizona constitutional amendment was adopted—by the people—that matters. Br. of Amicus Coolidge-Reagan Found. at 2. But this argument draws an artificial line between commissions adopted by legislative proposal and those adopted by state constitutional convention, like Hawaii's and Montana's. Haw. Const. art. IV, § 2; Mont. Const. art. V, § 14. This ignores the fundamental purpose of federalism and sovereign States, which is to preserve liberty and powers for the people. Provisions adopted by constitutional convention are hardly less valid than constitutional provisions proposed by a legislature.

Thus, to best protect our federalism, the amici States ask this Court to adhere to its own prior cases. As in *Smiley*, the relevant question here is "whether the function contemplated by Article 1, § 4, is that of making laws." *Smiley*, 285 U.S. at 366. Arizona and all of the other States that have chosen to solve a difficult policy problem with independent redistricting commissions are working within the powers contemplated by our federalism. If this harms the National Government, Congress may step

in and exercise its express powers to regulate this aspect of redistricting.[15]

CONCLUSION

The Court should affirm and conclude that Arizona's constitutional provision adopting its Independent Redistricting Commission is consistent with the Elections Clause.

RESPECTFULLY SUBMITTED.

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[15] We also agree with the Arizona Independent Redistricting Commission that Congress has invoked its Elections Clause power in 2 U.S.C. § 2a(c) to permit States to regulate redistricting by initiative. Br. For Appellees at 27-33.

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APPENDIX

Article I, Section 4, Clause 1 of the United States Constitution provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.